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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 241

LIEBMANN BREWERIES, INC.,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES, UPA PICTURES, INC., UPA ENTERPRISES and COLUMBIA PICTURES CORPORATION,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

LEON M. COOPER,
742 South Hill Street,
Los Angeles 14, California,

WALTER H. LIEBMAN,
32 East 57th Street,
New York, New York,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES, UPA PICTURES, INC., UPA ENTERPRISES and COLUMBIA PICTURES CORPORATION,

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

The Petitioner prays that a Writ of Certiorari issue to review the Order of the District Court of Appeal of the State of California, Second Appellate District, made and entered on or about June 1, 1959, denying a Petition for Writ of Mandate without opinion and without the issuance of an Alternative Writ or Order to Show Cause in Case No. 23820 entitled "Liebmann Breweries, Inc., Petitioner, vs. The Superior Court of the State of California in and for the County of Los Angeles, Respondent; UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Real Parties in Interest." The

Petition for Writ of Mandate was an original proceeding to compel the Superior Court of the State of California in and for the County of Los Angeles to Quash Service of Summons upon Petitioner on the ground that the Court had no jurisdiction over Petitioner, a New York corporation. The denial of the Petition finally decided that the California courts had jurisdiction over Petitioner. It thus deprived Petitioner of due process of law contrary to the Fourteenth Amendment to the United States Constitution.

The said District Court of Appeal has certified that the following Federal question was presented to and determined adversely to the Petitioner by the said court:

> "Whether the assertion by the California courts of jurisdiction over said Petitioner deprived said Petitioner of due process of law contrary to the Fourteenth Amendment to the United States Constitution where Petitioner is a foreign corporation which has never done business in California, which has no contacts with the State of California, which was being sued in the courts of California on a cause of action not arising in California, and the purported service on which was not made on any officer or agent of said Petitioner, but was made upon the California Secretary of State, and a copy of the Summons and pleading was sent by registered mail to Petitioner in New York." (Appendix B, *infra.*)

A timely Petition for Hearing by the Supreme Court of the State of California was denied.

Citations to Opinions Below.

The Order of the said District Court of Appeal denying the Petition for Writ of Mandate is without opinion and is unreported except that the Minutes thereof denying said Petition for Writ of Mandate are reported at 170 A. C. A., No. 5, page 3 of the Minutes of said Court.

The Order of the Supreme Court of the State of California denying a Petition for Hearing after denial of Petition for Writ of Mandate by the said District Court of Appeal was made and entered on July 1, 1959, and is unreported except that the Minutes thereof are reported at 52 A. C., No. 10, page 3 of the Minutes of said Court.

Jurisdiction.

Petitioner, a New York corporation, made its motion in the Superior Court of the State of California in and for the County of Los Angeles to Quash the purported Service of Summons upon it on the ground said Court had no jurisdiction *in personam* over it. (Cal. Code Civ Proc., Sec. 416.1.) That Motion was denied by the said Superior Court by an Order made and entered on or about April 3, 1959. No appeal lying from said Order, Petitioner filed a Petition for Writ of Mandate in the District Court of Appeal, Second Appellate District, State of California, pursuant to the California Code of Civil Procedure, Section 416.3. That Petition was denied by an Order of Court made and entered on June 1, 1959, without opinion and without the issuance of an Alternative Writ or an Order to Show Cause. Thereafter the Petitioner petitioned the Supreme Court of the State of California for a hearing, which Petition was denied without Opinion by an Order of the said Supreme Court on

or about July 1, 1959, which Order thereupon became final. (Rules on Appeal for the Supreme Court and District Court of Appeal of the State of California, Rules 24(a), 27(a) and 28(a)(b). Reprinted in Appendix A herein.) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, subsection (3), since the decision of the said District Court of Appeal was the final judgment of the highest Court in California in which a decision could be had on the questions raised in the original proceedings brought by the Petition for Writ of Mandate. (*Gospel Army v. City of Los Angeles*, 331 U. S. 543 (1947); *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8 (1931); *American Railway Express Co. v. Levee*, 263 U. S. 19 (1923).)

The Federal question sought to be reviewed was raised in the said Superior Court by the Petitioner moving to Quash Service of Summons upon it on the grounds that the said Court had no jurisdiction over Petitioner, a foreign corporation.

The Federal question sought to be reviewed here was then raised in the original proceedings on the Petition for Writ of Mandate in Paragraph X of the Petition for Writ of Mandate wherein Petitioner stated that the Writ should be granted and the Superior Court should be ordered to Quash Service of Summons on Petitioner because:

> "The attempt to obtain jurisdiction over the Petitioner by service of process on the Secretary of State of the State of California, which is not authorized by Petitioner to accept service of process for or on its behalf, is a deprivation of Petitioner's rights to due process of law, contrary to the provisions of the Fourteenth Amendment to the United States Constitution. . . ."

The Federal question sought to be reviewed here was similarly expressly raised in the Petition for Hearing by the Supreme Court of the State of California.

The District Court of Appeal has so certified and the Certificate is annexed hereto in Appendix B.

Each of the California courts necessarily passed upon the Federal question, review of which is sought here, by denying relief to the Petitioner and holding Petitioner subject to the jurisdiction of the California Courts.

Question Presented.

Whether the assertion by a State court of jurisdiction over a foreign corporation deprived it of due process of law contrary to the Fourteenth Amendment to the United States Constitution where it is a foreign corporation which never has done business in the State, which had no contacts with the State, which was being sued on a cause of action not arising in that State, and the purported service of the Summons and pleadings on which was not made on any officer or agent of the foreign corporation.

Statutes Involved.

The statutory provisions involved are California Code of Civil Procedure, Sections 411(2), 416.1, 416.2 and 416.3, and California Corporations Code, Sections 6301, 6403, and 6500 to 6504, inclusive. They are appended in Appendix A, *infra*.

Statement.

1. Statement of Proceedings.

The Respondents, other than the Superior Court, who are the Plaintiffs in Case No. 698923 in the Superior Court of the State of California in and for the County

of Los Angeles have commenced an action against, among others, your Petitioner, Liebmann Breweries, Inc. They have attempted to effect a service of Summons and Complaint in the Superior Court case upon the Petitioner, which had no employees or agents in California, and which has not designated any agent to accept service of process in California, by serving the Secretary of State.

Liebmann Breweries, Inc., appearing specially, moved to Set Aside the Order for Service of Process upon the Secretary of State and to Quash the purported Service of Summons.

Upon hearing of the said Motion the said Superior Court made its Order denying the Motion of your Petitioner.

Your Petitioner did, therefore, commence in the District Court of Appeal, Second Appellate District, State of California, an original proceeding by filing its verified Petition for Writ of Mandate to compel the said Superior Court to set aside the said Order for Service of Process upon the Secretary of State and to Quash the purported Service of Summons. The Petition contained as Exhibits A through G thereto the Amended Complaint in the case, the Order for Service of Process, the Stipulation Extending Time, the Notice of Motion to Quash, the Affidavit and Supplemental Affidavit of Walter H. Liebman, and the Declaration of Frank E. Delano. The Respondents conceded the truth of all the facts stated in the verified Petition by failing to file an answer to it (*Western States Construction Co. v. Municipal Court of the City and County of San Francisco*, 38 Cal. 2d 146, 283 P. 2d 502 (1952), and also conceded its sufficiency by failing to demur thereto. (*Goldman v. Superior Court*, 124 Cal. App. 2d 165, 166, 268 P. 2d 134 (1954).)

On June 1, 1959, the said District Court of Appeal, Second Appellate District, State of California, denied the Petition for Writ of Mandate without an Opinion and without Issuance of an Alternative Writ or Order to Show Cause.

On June 10, 1959, Petitioner filed in the Supreme Court of the State of California a Petition for Hearing by the Supreme Court to which no Answer was filed by Respondents. The Petition was denied on July 1, 1959.

2. Statement of Facts.

The following Statement of Facts is set forth in the verified Petition for Writ of Mandate and since no answer or demurrer was filed by Respondents must be taken as true:

Liebmann Breweries, Inc., is a New York corporation. It is in the business of brewing and selling beer and other malt beverages and the by-products thereof in the New York and New England area. In order so to do, Liebmann Breweries, Inc., carries a license to manufacture and sell beer in, among other states, the State of New York. Liebmann Breweries, Inc., does not now, nor did it at any of the times stated in the Amended Complaint herein ("Exhibit A" to the Petition for Writ of Mandate, Appendix B attached hereto) nor at the time of the purported service of Summons apply for, or hold, a license to manufacture, sell, or import beer or alcoholic beverages in the State of California. (Pars. 4-7, Exhibit E to the Petition for Writ of Mandate, Appendix B attached hereto.)

Liebmann Breweries, Inc., does not now nor did it at any of the times stated in the Amended Complaint herein ("Exhibit A" to the Petition for Writ of Mandate, Ap-

pendix B attached hereto) nor at the time of the purported service of process, solicit the sale, or advertise the sale, of its beer or products in the State of California. It had no and has no salesmen or officers or employees engaged in carrying on any business in the State of California. It had no and has no inventory in the State of California. It did not and does not import beer into the State of California. It had no and has no offices in California. (Pars. 8-9 of Exhibit E and Par. 8 of Exhibit F to the Petition for Writ of Mandate. Appendix B attached hereto.)

The corporate activities of Liebmann Breweries, Inc., are carried on at its principal office at 36 Forrest Street, Brooklyn 6, New York. The officers and directors of Liebmann Breweries, Inc., reside either in the State of New York or close to the New York metropolitan area. They neither reside in, nor do they carry on any business in, the State of California. (Pars. 4-5 of Exhibit E to the Petition for Writ of Mandate. Appendix B attached hereto.)

Liebmann Breweries, Inc., has never filed its Articles of Incorporation with the Secretary of State of the State of California, or with the County Clerk of any County of the State of California. It has never filed any statements in the manner and form of California Corporations Code, Section 6403, with the Secretary of State of the State of California, nor has it ever designated any agent for the service of process in the State of California. (Par. 10 of Exhibit E to the Petition for Writ of Mandate. Appendix B attached hereto.)

Liebmann Breweries, Inc., has never paid nor does it have any liability to pay any corporate franchise tax, or sales tax, or use tax, or real property tax, or personal

property tax, in or to the State of California. (Pars. 10 and 14 of Exhibit E to the Petition for Writ of Mandate. Appendix B attached hereto.)

Liebmann Breweries, Inc., is not, and never has been, in the business of producing television spot commercials in the State of California, nor the supervision of television spot commercials in the State of California. It has never engaged in the State of California in the business of causing television commercials to be viewed by the public in the State of California for the purpose of promoting the sale of Rheingold Beer in the State of California. (Par. 15 of Exhibit E to the Petition for Writ of Mandate. Appendix B attached hereto.)

Liebmann Breweries, Inc., has never entered into any contract with the Plaintiffs, nor has anyone on behalf of Liebmann Breweries, Inc., entered into any contracts with the Plaintiffs for the licensing of Liebmann Breweries, Inc., to use a fanciful character named Mr. Magoo in television spot commercials or otherwise for the purpose of advertising the sale of Rheingold Beers in the State of California or elsewhere. (Par. 11 of Exhibit E, Pars. 7-10 of Exhibit F and Pars. 1-9 of Exhibit G to the Petition for Writ of Mandate. Appendix B attached hereto.)

Rheingold Brewing Company was originally incorporated under and pursuant to the laws of the State of California on June 2, 1933, under the name of Rex Brewing Company. Thereafter, on July 23, 1933, its name was changed to California Brewing Association of Southern California. On March 29, 1935, its name was changed to Acme Brewing Company, and on March 9, 1954, to Rheingold Brewing Company, Los Angeles, Subsidiary of Liebmann Breweries, Inc., N. Y.

Prior to 1954, Rheingold Brewing Company, under the name of Acme Brewing Company, conducted an extensive business of manufacturing, distributing, and selling beer in the State of California, principally under the label of Acme Beer. (Par. 11 of Exhibit F to the Petition for Writ of Mandate. Appendix B attached hereto.)

In 1954 the stock of certain corporations which owned the stock of Acme Brewing Company was sold with the result that ultimately Liebmann Breweries, Inc., owned approximately five-sixths (5/6) of the stock of Continental Holding Corporation, which in turn owned a majority of the stock of the corporations owning the stock of Rheingold Brewing Company. Approximately one-sixth (1/6) of the stock of Continental Holding Corporation is owned by Bohemian Distributing Company, a California corporation. None of the stockholders of Bohemian Distributing Company are stockholders of Liebmann Breweries, Inc., nor are any of the stockholders of Liebmann Breweries, Inc., stockholders of Bohemian Distributing Company. (Par. 11 of Exhibit F to the Petition for Writ of Mandate. Appendix B attached hereto.)

The existence of Rheingold Brewing Company under its former corporate names antedates by eleven years the purchase by Liebmann Breweries, Inc., of any interest in any corporation which owned stock in corporations owning stock in Rheingold Brewing Company. Rheingold Brewing Company was not, therefore, created, nor does it exist, nor has it ever existed as a means or device for Liebmann Breweries, Inc., to do business in the State of California. It was and is a separate corporation. (Par. 12 of Exhibit F to the Petition for Writ of Mandate. Appendix B attached hereto.)

Rheingold Brewing Company maintains separate books and records, a separate office, and has its own stockholders, officers and directors. Rheingold Brewing Company handles its own purchases and sales and has always conducted itself as a separate corporation, maintaining its separate corporate existence as an entity apart from Liebmann Breweries, Inc. (Par. 13 of Exhibit F to Petition for Writ of Mandate. Appendix B attached hereto.)

During the course of the original negotiations in connection with the licensing of the character Mr. Magoo, Liebmann Breweries, Inc., negotiated in the State of New York for the right to use the character Mr. Magoo in advertising Liebmann Breweries, Inc.'s products in the New York area. Such discussions, commencing in September, 1955, were continued during the months of October and November, 1955. Drafts of the proposed contracts were prepared and are appended as Exhibits 1 and 2 to the Supplemental Affidavit of Water H. Liebman. ("Exhibit F" to the Petition for Writ of Mandate. Appendix B attached hereto.) They should be compared with Exhibits A, A-1 and C to the Amended Complaint herein. (Exhibit A to the Petition for Writ of Mandate. Appendix B attached hereto.)

Neither Liebmann Breweries, Inc., nor any person, firm or corporation on its behalf ever entered into any contract with the Plaintiffs in any manner whatsoever for any purposes whatsoever. (Par. 7 of Exhibit F to the Petition for Writ of Mandate. Appendix B attached hereto.)

In June, 1956, further discussions and negotiations were undertaken by representatives of Liebmann Breweries, Inc., and representatives of the Plaintiffs for the right to

license and produce television films of Mr. Magoo for commercial purposes in the New York area to advertise the product of Liebmann Breweries, Inc. Again, drafts of proposed agreements were prepared. They are attached as Exhibits 3, 4 and 5 to the Supplemental Affidavit of Walter H. Liebman. ("Exhibit F" to the Petition for Writ of Mandate. (Appendix B attached hereto.) They should be read in light of the executed Exhibits A, A-1, B and C to the Amended Complaint herein. "Exhibit A" to the Petition for Writ of Mandate. Appendix B attached hereto.) The proposed agreements were never executed, although Exhibit B to the Amended Complaint was executed and limited the licensed area to California and the city of Yuma, Arizona.

Through an inadvertence, the name Liebmann Breweries, Inc., which had been included in the drafts of the agreements when they had contemplated the licensing for use in the New York area, was left on the finally executed agreements. It is clear that this was an inadvertence, not only from the Affidavits, but also from the contracts. Paragraph 1 of Exhibit A to the Amended Complaint ("Exhibit A" to the Petition for Writ of Mandate. Appendix B attached hereto) limits the license to use the cartoon character for the purpose of "advertising, publicizing, and promoting Client, its products and services, in the territory hereinafter specified, over television only in connection with programs sponsored in whole or in part by Client . . . ."

Thus, when Liebmann Breweries, Inc.'s marketing territory was eliminated from the contract, it was no longer a "Client" within the contemplation of the agreement, since it could not advertise itself or its products or services in California or Arizona. Its name was left on only

through inadvertence. Liebmann Breweries, Inc., was not a party to any of the agreements. (Pars. 2-7 of Exhibit F and Pars. 2-9 of Exhibit G to the Petition for Writ of Mandate. Appendix B attached hereto.)

The attempt to serve Liebmann Breweries, Inc., is illegal, invalid and unconstitutional by reason of the fact the Liebmann Breweries, Inc., is not doing and never has done business in the State of California. Therefore, the attempt to obtain jurisdiction over Liebmann Breweries, Inc., is a deprivation of due process contrary to the Fourteenth Amendment to the United States Constitution.

Reasons for Granting the Writ.

1. **The Decision of the District Court of Appeal of the State of California, Second Appellate District, Below in the Instant Case Which Deprived the Petitioner of Due Process of Law Contrary to the Fourteenth Amendment to the United States Constitution Is Inconsistent With the Pertinent Decisions of the United States Supreme Court and the United States Courts of Appeals Holding That a Foreign Corporation, Not Doing Business in the Forum and Having No Contacts With the Forum, Which Is Being Sued on a Cause of Action Not Arising in the Forum, and Purported Service on Which Was Not Made on Any Agent or Representative of the Foreign Corporation, Is Not Subject to the Jurisdiction of the State Courts of the Forum.**

The verified Petition for Writ of Mandate below sets forth the undisputed facts. This Honorable Court will ascertain for itself the facts disclosed by the record. (*Consolidated Textile Corp. v. Gregory*, 287 U. S. 85, 86 (1933).)

Nowhere does the record show, that the Petitioner was doing business in California or had any contacts with

California at the time of purported service upon it by serving the California Secretary of State with the Summons and Complaint in the Superior Court action or that the cause of action arose in California. It is a Federal constitutional requirement to the assertion of jurisdiction that these facts be proved. (*Consolidated Textile Corp., v. Gregory supra.*) The representatives of the foreign corporation must be carrying on the jurisdictional activities in the forum at the time of the purported service of Summons. (*Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437, 444-445 (1952); *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).)

But Petitioner neither sold its products, nor purchased any goods or services, nor carried on any corporate activity in California.

The record is utterly devoid of any facts to show the doing of business by Petitioner in California at the time of the purported service of Summons upon it. Petitioner, therefore, is not and could not be subject to the jurisdiction of the courts of the State of California. (*Chipman v. Jeffery Co.*, 251 U. S. 373 (1920).)

Even if Petitioner entered into a contract with said Respondents, the contract would not be sufficient to warrant the inference that it is present for the purpose of jurisdiction, since that factor alone does not provide a sufficient contact to overcome requirements of due process.

Rosenberg Bros. & Co. v. Curtis-Brown Co., 260 U. S. 516 (1923).

Petitioner owned the majority of stock in a California corporation which in turn owned the stock of another California corporation, the separate corporate identities of each of the corporations having been carefully preserved. The subsidiary was in business for many years before its stock was indirectly acquired by Petitioner. Such ownership of stock could not justify the assertion of jurisdiction over Petitioner.

This Honorable Court has conclusively determined that a State or Federal Court does not have jurisdiction over a foreign corporation because it has a domestic subsidiary.

Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U. S. 333 (1925);

Consolidated Textile Corp. v. Gregory, 289 U. S. 85, 88 (1933);

Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364 (1907);

Philadelphia & Reading Railway Co. v. McKibbin, 243 U. S. 264 (1917).

The reasoning of this Court in establishing the rule is found in the language of *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U. S. 333, at pages 336-337:

> "The question is simply whether the corporate separation carefully maintained must be ignored in determining the existence of jurisdiction. The defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the state in its corporate capacity. It might have conducted such

> business through an independent agency without subjecting itself to the jurisdiction . . . It preferred to employ a subsidiary corporation. Congress has not provided that a corporation of one state shall be amenable to suit in the Federal Court of another state in which the plaintiff resides whenever it employs a subsidiary corporation as the instrumentality for doing business therein . . . That such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction was settled . . . In the case at bar the identity of interest may have been more complete and the exercise of control over the subsidiary more intimate than in the three cases cited, but that fact has, in the absence of an applicable statute, no legal significance. The corporate separation, though perhaps merely formal, was real. It was not pure fiction."

The California Court below has, in effect, held that there is no limitation on the assertion of jurisdiction over foreign corporations. That there is a constitutional limitation upon the scope of the jurisdiction asserted by State courts over foreign corporations has been recently clearly enunciated by the United States Supreme Court. In *Hanson v. Denckla*, 357 U. S. 235 at pages 250-251 (1958), the Court, after pointing out the trend of less rigid requirements for personal jurisdiction over nonresidents, stated:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on personal jurisdiction of state courts. See *Vanderbilt v. Vanderbilt*, 354 U. S. 416, 418. Those restrictions

are more than a guaranty of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."

The doctrine of *Cannon* has been consistently followed by the Federal Courts, including the Court of Appeals for the Ninth Circuit.

See:

Gravely Motor Plow & Cultivator Co. v. H. V. Carter Co., 193 F. 2d 158 (C. A. 9, 1951);

Selbert v. Lancaster Chocolate & Caramel Co., 23 F. 2d 233 (C. A. 6, 1928);

Berkman v. Ann Lewis Shops, Inc., 246 F. 2d 44 (C. A. 2, 1957);

Harris v. Deere & Co., 233 F. 2d 161 (C. A. 4, 1955);

Berghold v. Hudson Motor Car Co., 124 Fed. Supp. 716 (D. Minn., 1954);

Hudson Minneapolis, Inc. v. Hudson Motor Car Co., 124 Fed. Supp. 720 (D. Minn., 1954);

Moorehead v. Curtis Publishing Company, 43 Fed. Supp. 67 (D. Ky., 1942).

2. This Honorable Court Should Issue Its Writ of Certiorari Directed to the District Court of Appeal of the State of California, Second Appellate District, Because the Question Presented Is of Importance to the National Economy in Determining the Jurisdiction of State Courts Over Foreign Corporations.

This Honorable Court has heretofore considered the importance of sound laws governing flow of commerce between the states. At the same time this Court has upheld the constitutional restrictions on the assertion of jurisdiction by state courts over foreign corporations or foreign residents contrary to the provisions of the Fourteenth Amendment to the United States Constitution. (*Hanson v. Denckla*, 357 U. S. 235, 250-251 (1958).)

In keeping with the restrictions on the assertion of jurisdiction by state courts over foreign corporations repeatedly enunciated by this Honorable Court, many corporations of one state have purchased the stock of corporations of other states.

It will now come as a rude shock to these corporations that their indirect interests in foreign subsidiaries will mean that for the purposes of service of process and assertion of jurisdiction by the courts of other states over them they are subject to the jurisdiction of the courts of the other state although not doing business in these states. The result can be the dissipation of the incentive and the eagerness with which foreign enterprises approach the purchasing of interests in the businesses of other states and the establishment of foreign subsidiaries, and the stream of capital between businesses in various states may be dried up. Thus the questions presented to this Court are not only important questions of law, but are important from a practical and economic standpoint, and should be given a full hearing by this Honorable Court.

This attempted assertion of jurisdiction over Petitioner by the Courts of California is contrary to the clear and unequivocal opinion in the decisions in the Supreme Court of the United States and the lower Federal Courts.

It is therefore clear that on the facts in the record which were presented to the Honorable Court below, the Honorable District Court of Appeal of the State of California has failed to follow the decisions of this Honorable United States Supreme Court and the United States Court of Appeals, and therefore has deprived Petitioner of due process of law which has been afforded other foreign corporations. It is necessary therefore not only as an important question of constitutional law but also because of the effect of the ruling on business practices now widely carried on throughout the United States that uniformity of decision be maintained and that the erroneous Order of the District Court of Appeal of the State of California should be reversed.

Conclusion.

For the foregoing reasons, it is respectfully submitted:

1. This Petition for Certiorari should be granted.
2. This case should be set down for argument.
3. An Order should be issued which would preserve the *status quo* to protect Petitioner from irreparable injury staying all proceedings in the Superior Court of the State of California pending a final decision by this Honorable Court.

Respectfully submitted,

LEON M. COOPER,

WALTER H. LIEBMAN,

By LEON M. COOPER,

Counsel for Petitioner.

APPENDIX A.

Pertinent Statutes Involved.

"The summons must be served by delivering a copy thereof as follows . . .

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business in this State; in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code."

Code of Civil Procedure, Section 411, Subsection 2.

"(*Notice of Motion to quash service of summons on ground of lack of jurisdiction: Contents of notice: Extension of time for moving party to plead to complaint or cross-complaint.*)

Any defendant or cross-defendant upon whom service of summons has been made may serve and file, on or before the last day on which he is required to plead, or within such further time as the court may for good cause allow, a notice of motion to quash the service of summons, upon the ground of lack of jurisdiction of the court over him. The notice shall designate as the time of making such motion a date not more than 10 days following the filing of such notice of motion. In the event of the service and filing of such motion, the time of the moving party to plead to the complaint or cross-complaint shall be extended, and no default may be entered against him, until the expiration of 10 days following service upon him of written notice of entry of an order of the court denying the motion. Upon good cause being shown, the court may extend the latter 10-day period for an ad-

ditional period not exceeding 20 days. Neither an application to the court by any defendant or cross-defendant for an extension of time within which to plead, nor the granting of such extension nor entering into a stipulation of the parties for such extension, shall constitute a general appearance by said defendant or cross-defendant."

Code of Civil Procedure, Section 416.1

"(*Same: Effect of motion under §416.1 and motion for relief under §473: Motion not constituting general appearance.*)

If a defendant or cross-defendant moves to quash service of summons in the manner provided in Section 416.1 of this code, and also moves for relief under Section 473 of this code, the latter motion shall not constitute a general appearance by the moving party."

Code of Civil Procedure, Section 416.2.

"(*Same: Procedure on denial of motion: Petition to appellate court for writ of mandate requiring entry of order quashing service: Notice of petition: Extension of time to plead.*)

If a motion of a defendant or cross-defendant to quash service of summons, as provided in Section 416.1 of this code, is denied by the court, he may, before pleading, and within 10 days after service upon him of written notice of the order of the court denying the motion, or within such additional time not exceeding 20 days as the court may allow, petition an appropriate appellate court for a writ of mandate directed to the court wherein the action or proceeding is pending requiring the entry of its order quashing the service of summons. If he shall thereupon serve upon the adverse party and file

with the clerk of the latter court a notice that he has petitioned for such writ of mandate, his time to plead shall be extended, and no default may be entered against him, for a period of 10 days following written notice of the final judgment in the mandamus proceeding, which time for goood cause may be extended by the court for an additional period of not to exceed 20 days."

Code of Civil Procedure, Section 416.3

"*Foreign corporations with subsidiaries engaged in intrastate business.* This part does not apply to a foreign corporation merely because a subsidiary corporation owned or controlled by it is engaged in the transaction of intrastate business in this State."

Corporations Code, Section 6301.

"*Filing statement with Secretary of State: Contents.* A foreign corporation shall not transact intrastate business in this State until it has also filed with the Secretary of State a statement setting forth all of the following:

(a) The location and address of its main office.

(b) The location and address of its principal office within this State.

(c) The name of an agent upon whom process directed to the corporation may be served within this State. The agent may be a natural person residing within the State in which case his complete business or residence address shall be set forth, or it may be a domestic corporation which has filed the certificate provided for in Section 3301.5 or a foreign corporation which has filed the certificate provided for in Section 6403.5. If a corporate agent be designated, the statement shall set forth the state or place under the laws of which such agent was incorporated and the name of the city, town or village

wherein it has the office at which the corporation designating it as such agent may be served, as set forth in the certificate filed by such corporate agent pursuant to Section 3301.5, 3301.6, 6403.5 or 6403.6.

(d) Its irrevocable consent to service of process directed to it upon the agent designated, and to service of process on the Secretary of State if the agent so designated or the agent's successor is no longer authorized to act or cannot be found at the address given."

Corporations Code, Section 6403.

"*What constitutes valid service on corporations: Evidence of appointment of agent for service of process.* Delivery by hand of a copy of any process against a foreign corporation (a) to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the general manager in this State, or if the corporation be a bank to a cashier or an assistant cashier, (b) to any natural person designated by it as agent for the service of process, or (c), if the corporation has designated a corporate agent, at the office of such corporate agent in the city, town or village named in the statement filed by the corporation pursuant to Section 6403 to any person at such office named in the certificate of such corporate agent filed pursuant to Section 3301.5 or 6403.5, if such certificate has not been superseded, or otherwise to any person at such office named in the last certificate filed pursuant to Section 3301.6 or 6403.6, shall constitute valid service on the corporation.

A copy of the designation, certified by the Secretary of State, is sufficient evidence of the appointment of an agent for the service of process."

Corporations Code, Section 6500.

"*Order for service on Secretary of State.* If the agent designated for the service of process be a natural person and cannot be found with due diligence at the address stated in the designation or if such agent be a corporation and no person can be found with due diligence to whom the delivery authorized by Section 6500 may be made for the purpose of delivery to such corporate agent, or if the agent designated is no longer authorized to act, or if no agent has been designated and if no one of the officers or agents of the corporation specified in Section 6500 can be found after diligent search and it is so shown by affidavit to the satisfaction of the court or judge, then the court or judge may make an order that service be made by personal delivery to the Secretary of State or to an assistant or deputy secretary of state of two copies of the process together with two copies of the order, except that if the corporation to be served has not filed the statement required to be filed by Section 6403 then only one copy of the process and order need be delivered but the order shall include and set forth an address to which such process shall be sent by the Secretary of State."

Corporations Code, Section 6501.

"*Duty of Secretary of State to give notice to corporation of service of process: Manner of giving notice.* Upon receipt of the process and order and his fee therefor the Secretary of State forthwith shall give notice to the corporation of the service of the process by forwarding by registered air mail, charges prepaid, with request for return receipt, a copy of the process and order to the address specified in the order if the corporation has not filed the statement required by Section 6403,

otherwise to the two offices of the corporation the addresses of which are set forth in such statement or in statements subsequently filed."

Corporations Code, Section 6502.

"*Time to appear; Record of process: Certificate of Secretary of State as evidence.* The corporation shall appear within thirty days after delivery of the process to the Secretary of State. The Secretary of State shall keep a record of all process served upon him and shall record therein the time of service and his action in respect thereto. The certificate of the Secretary of State, under his official seal, certifying to the receipt of process, the giving of notice thereof to the corporation, and the forwarding of such process, pursuant to this chapter, shall be competent and *prima facie* evidence of the matters stated therein."

Corporations Code, Section 6503.

"*Service of process where foreign corporation has withdrawn from business: Surrender of right to transact intrastate business.* A foreign corporation which has transacted intrastate business in this State and has thereafter withdrawn from business in this State may be served with process in the manner provided in this chapter in any action brought in this State arising out of such business, whether or not it has ever complied with the requirement of Chapter 3 of this part.

If a foreign corporation has surrendered its right to transact intrastate business pursuant to Chapter 6 of this part, process against it delivered to the Secretary of State, his assistant or a deputy pursuant to Chapter 4 in any action upon a liability or obligation incurred within the State prior to such surrender shall be mailed in the

manner prescribed in Chapter 4 except that the Secretary of State shall send the copy of the process to the address set forth in the certificate of surrender."

Corporations Code, Section 6504.

"(*When decisions become final*). All decisions of the reviewing courts shall be filed with the clerk. A decision of the Supreme Court becomes final 30 days after filing unless a shorter time is ordered prior to the expiration of said 30 day period. A decision of a District Court of Appeal becomes final as to that court 30 days after filing, except that the denial without opinion of a petition for a writ within its original jurisdiction without issuance of an alernative writ or order to show cause becomes final as to that court immediately after filing. When a decision of a District Court of Appeal is final as to said court, it is not thereafter subject to modification or hearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein beings to run anew, as of the date of modification."

Rules of California Supreme Court and District Court of Appeal, Rule 24(a).

"(*Power to grant rehearing*). The Supreme Court or a District Court of Appeal may grant a rehearing after its own decision in any cause except the denial without opinion by a District Court of Appeal of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause. Any cause pending in a department of the Supreme Court may be ordered

heard by the Supreme Court in bank. A rehearing or hearing in bank may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion prior to but not after the time the decision becomes final therein."

Rules of California Supreme Court and District Court of Appeal, Rule 27(a).

"(a) (*Time within which court may grant hearing*). Within 30 days after a decision of a District Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition, may order the cause transferred to itself for hearing and decision.

(b) (*Time for filing petition*). A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the District Court of Appeal becomes final as to that court. An original and 17 copies of a printed petition or an original and 10 copies of a typewritten petition shall be filed, with proof of delivery of 3 copies of a printed petition or one copy of a typewritten petition to the clerk of the District Court of Appeal which rendered the decision. When such copies are delivered to the clerk of the District Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper District Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court."

Rules of California Supreme Court and District Court of Appeal, Rules 28(a) and 28(b).

APPENDIX B.

In the District Court of Appeal

SECOND APPELLATE DISTRICT

State of California

LIEBMANN BREWERIES, INC., a corporation,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF MANDATE.

(Code Civ. Proc., Sec. 416.3.)

To the District Court of Appeal, Second Appellate District, State of California, and to the Honorable Presiding Justice and Associate Justices Thereof:

Your Petitioner, Liebmann Breweries, Inc., respectfully applies for Writ of Mandate (Code Civ. Proc., Sec. 416.3) by this, its verified Petition, to compel the Honorable Superior Court of the State of California, in and for the County of Los Angeles, to enter an Order to set aside its Order for substituted service of process and to quash service of Summons upon Petitioner, and in its behalf sets forth the following facts and causes for issuance of a Writ of Mandate, namely:

I.

On or about June 12, 1958, UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, some-

times hereinafter referred to as "Real Parties in Interest," filed in the Superior Court of the State of California in and for the County of Los Angeles, a Summons on Amended Complaint and Amended Complaint in case number 698923 in said Court entitled "UPA PICTURES, INC., UPA ENTERPRISES and COLUMBIA PICTURES CORPORATION, Plaintiffs, vs. FOOTE, CONE & BELDING, INC., LIEBMANN BREWERIES, INC. and RHEINGOLD BREWING COMPANY, Defendants," in the form of "Exhibit A" attached hereto and incorporated by reference herein as though set forth in full hereat.

II.

The causes of action brought by the Plaintiffs were for breach of contract against the Defendants. They allege damages for breach of contract against the Defendants upon alleged written agreements dated November 11, 1955, and January 21, 1956, for the production of television commercials and the licensing of a fanciful cartoon character "Mr. Magoo" for advertising Rheingold Beer in the State of California.

III.

On or about November 28, 1958, the Honorable A. Edwards Nichols, Court Commissioner of the Superior Court of the State of California in and for the County of Los Angeles, purported to issue an alleged Order for Service of Process upon the Secretary of State in the said case No. 698923, which purported to order that service of process in the said case No. 698923 upon Defendant, Liebmann Breweries, Inc., be made by personal delivery of a copy of the Summons and Complaint therein, together with a copy of the said purported Order, to the Secretary of State, or to an assistant or Deputy Secretary of State, and that such process and Order then be sent

by the Secretary of State to said Defendant, Liebmann Breweries, Inc., at its business address at 36 Forrest Street, Brooklyn 6, New York. A copy of said Order is attached hereto as "Exhibit B" and incorporated by reference herein as though set forth in full hereat.

IV.

On or about January 5, 1959, pursuant to Section 416.1 of the Code of Civil Procedure, and a Stipulation by and between the said "Real Parties in Interest" by and through their counsel Youngman, Hungate & Leopold. Richard Hungate and Glenn Warner, and the Petitioner, appearing specially only, by and through its counsel, Coyle and Cooper and Leon M. Cooper, the said Honorable Superior Court on good cause appearing therefor ordered that the Petitioner, appearing specially only for the purpose of moving to quash service of Summons and without submitting itself to the jurisdiction of the said Superior Court, shall have until January 23, 1959, within which to serve and file its Notice of Motion to Quash Service of Summons upon the Petitioner upon the ground of lack of jurisdiction over it. A copy of said Stipulation and Order is attached hereto as "Exhibit C" and incorporated by reference herein as though set forth in full hereat.

V.

On or about January 22, 1959, the Petitioner, appearing specially only for the purpose of making a Motion so to do, without submitting itself to the jurisdiction of said Superior Court, and for no other purpose, filed, served and made its Notice of Motion to vacate and set aside the Order for Service of Process and to quash the service of summons. A copy of said Motion is attached hereto as "Exhibit D" and incorporated by reference herein as though set forth in full hereat.

VI.

Said Motion was made and based upon the said Notice, the Affidavit of Walter H. Liebman in Support of said Motion, Points and Authorities in Support of said Motion, and the records and files in the said case, and any other affidavits, declarations or documents which might have been filed in said case prior to the hearing of said Motion.

Prior to the hearing on the said Motion the "Real Parties in Interest" filed Affidavits and offered certain portions of depositions in evidence in opposition to the Motion, and the Petitioner filed Supplemental Affidavits and Supplemental Points and Authorities in Support of the said Motion.

Copies of the Affidavit of Walter H. Liebman, the Supplemental Affidavit of Walter H. Liebman and the Declaration of Frank E. Delano, all in support of the Motion, are attached hereto as "Exhibits E, F and G" respectively and incorporated by reference herein as though set forth in full hereat.

VII.

Hearings on said Motion were had, and argument was presented to the said Honorable Superior Court, in Department 67 thereof, the Honorable Evelle J. Younger, Judge Presiding, on March 30, 1959, and on April 3, 1959.

VIII.

The said Superior Court denied the Motion. On April 7, 1959, the said Youngman, Hungate & Leopold, attorneys for the "Real Parties in Interest" served notice upon the Petitioners by serving their attorneys of record that the said Honorable Superior Court had denied the said Motion.

IX.

This Petition seeks a Writ of Mandate in this Honorable Court to compel the said Honorable Superior Court to set aside its said Order for Service of Process upon the Secretary of State, and to Quash the service of Summons on the Petitioner in the said Superior Court case.

X.

The Honorable Superior Court of the State of California in and for the County of Los Angeles should be Ordered, by this Honorable Court, to set aside its said Order for Service of Process upon the Secretary of State and to Quash Service of Summons on Petitioner because:

1. Petitioner is a New York corporation organized under and by virtue of the laws of the State of New York;

2. The Petitioner never has and does not now transact or do any corporate or other business within the State of California;

3. Petitioner does not maintain any agent, officer, or other person in the State of California upon whom service of Summons can be made;

4. The said Honorable Superior Court has no jurisdiction over Petitioner and has no basis for asserting jurisdiction over Petitioner;

5. The attempt to obtain jurisdiction over the Petitioner by service of process on the Secretary of State of the State of California, which is not authorized by Petitioner to accept service of process for or on its behalf, is a deprivation of Petitioner's rights to due process of law, contrary to the provisions of the Fourteenth Amendment of the United States Constitution, and Article I, Section 13, Clause

6, of the Constitution of the State of California, and provisions of the Code of Civil Procedure and the Corporations Code of the State of California.

XI.

In support of this Petition, your Petitioner respectfully submits the following facts which are more specifically set forth in the said Affidavit of Walter H. Liebman ["Exhibit E" hereto], the Supplemental Affidavit of Walter H. Liebman ["Exhibit F" hereto], and the Declaration of Frank E. Delano ["Exhibit G" hereto], all of which are incorporated by reference herein as though set forth in full hereat:

1. Liebmann Breweries, Inc., is a New York corporation. It is in the business of brewing and selling beer and other malt beverages and the by-products thereof in the New York and New England area. In order so to do, Liebmann Breweries, Inc., carries a license to manufacture and sell beer in, among other states, the State of New York. Liebmann Breweries, Inc., does not now, nor did it at any of the times stated in the Amended Complaint herein ["Exhibit A"] nor at the time of the purported service of Summons upon Petitioner herein apply for, or hold, a license to manufacture, sell, or import beer or alcoholic beverages in the State of California.

2. Liebmann Breweries, Inc., does not now, nor did it at any of the times stated in the Amended Complaint herein ["Exhibit A"] nor at the time of the purported service of process solicit the sale, nor advertise the sale, of its beer or products in the State of California. It had no and has no salesmen or officers or employees engaged in carrying on any business in the State of California. It had no and has no inventory in the State of California. It did not and does not import beer into the State of California. It had no and has no offices in California.

3.- The corporate activities of Liebmann Breweries, Inc., are carried on at its principal office at 36 Forrest Street, Brooklyn, 6, New York. The officers and directors of Liebmann Breweries, Inc., reside either in the State of New York or close to the New York metropolitan area. They neither reside in, nor do they carry on any business in, the State of California.

4. Liebmann Breweries, Inc., has never filed its Articles of Incorporation with the Secretary of State of the State of California, or with the County Clerk of any County of the State of California. It has never filed any statements in the manner and form of California Corporations Code, Section 6403, with the Secretary of State of the State of California, nor has it ever designated an agent for the service of process in the State of California.

5. Liebmann Breweries, Inc., has never paid nor does it have any liability to pay any corporate franchise tax, or sales tax, or use tax, or real property tax, or personal property tax, or unemployment withholding tax in or to the State of California. Liebmann Breweries, Inc., has never been required to carry insurance under the Workmen's Compensation Law of the State of California.

6. Liebmann Breweries, Inc., is not, and never has been, in the business of producing television spot commercials in the State of California, nor the supervision of television spot commercials in the State of California. It has never engaged in the State of California in the business of causing television commercials to be viewed by the public in the State of California for the purpose of promoting the sale of Rheingold Beer in the State of California.

7. Liebmann Breweries, Inc., has never entered into any contract with the Plaintiffs, nor has anyone on be-

half of Liebmann Breweries, Inc., entered into any contracts with the Plaintiffs for the licensing of Liebmann Breweries, Inc., to use a fanciful character named Mr. Magoo in television spot commercials or otherwise for the purpose of advertising the sale of Rheingold Beer in the State of California.

8. Rheingold Brewing Company was originally incorporated under and pursuant to the laws of the State of California on June 2, 1933, under the name of Rex Brewing Company. Thereafter, on July 23, 1933, its name was changed to California Brewing Association of Southern California. On March 29, 1935, its name was changed to Acme Brewing Company, and on March 9, 1954, to Rheingold Brewing Company, Los Angeles, Subsidiary of Liebmann Breweries, Inc., N. Y.

9. Prior to 1954, Rheingold Brewing Company, under the name of Acme Brewing Company, conducted an extensive business of manufacturing, distributing, and selling beer in the State of California, principally under the label of Acme Beer.

10. In 1954 the stock of certain corporations which owned the stock of Acme Brewing Company was sold with the result that ultimately Liebmann Breweries, Inc., owned approximately five-sixths (5/6) of the stock of Continental Holding Corporation, which in turn owned a majority of the stock of the corporations owning the stock of Rheingold Brewing Company. Approximately one-sixth (1/6) of the stock of Continental Holding Corporation is owned by Bohemian Distributing Company, a California Company, a California corporation. None of the stockholders of Bohemian Distributing Company are stockholders of Liebmann Breweries, Inc., nor are any of the stockholders of Liebmann Breweries, Inc., stockholders of Bohemian Distributing Company.

11. The existence of Rheingold Brewing Company under its former corporate names antedates by Eleven (11) years the purchase by Liebmann Breweries, Inc., of any interest in any corporation which owned stock in corporations owning stock in Rheingold Brewing Company. Rheingold Brewing Company was not, therefore, created, nor does it exist, nor has it ever existed as a means or device for Liebmann Breweries, Inc., to do business in the State of California. It was and is a separate corporation.

12. Rheingold Brewing Company maintains separate books and records, a separate office, and has its own stockholders, officers and directors. Rheingold Brewing Company handles its own purchases and sales and has always conducted itself as a separate corporation, maintaining its separate corporate existence as an entity apart from Liebmann Breweries, Inc.

13. During the course of the original negotiations in connection with the licensing of the character Mr. Magoo, Liebmann Breweries, Inc., negotiated in the State of New York for the right to use the character Mr. Magoo in advertising Liebmann Breweries, Inc.'s products in the New York Area. Such discussions, commencing in September, 1955, were continued during the months of October and November, 1955. Drafts of the proposed contracts were prepared and are appended as Exhibits 1 and 2 of the Supplemental Affidavit of Walter H. Leibman ["Exhibit F"]. They should be compared with Exhibits A, A-1 and C to the Amended Complaint herein ["Exhibit A"].

14. In these preliminary negotiations it was contemplated that the advertising agency, Foote, Cone & Belding, would produce commercials for and obtain the licensing of the cartoon character Mr. Magoo for advertising the

sale of the beer produced by Liebmann Breweries, Inc., in the New York area, and by Rheingold Brewing Company in California. The negotiations with regard to the production for television viewing and the licensing in the New York area of the cartoon character for Liebmann Breweries, Inc., never culminated in the execution of any contracts. Thus, Liebmann Breweries, Inc., never entered into any contract with the Plaintiffs for the licensing of, or the production of television spot commercials involving a cartoon character.

15. In June, 1956, further discussions and negotiations were undertaken by representatives of Liebmann Breweries, Inc., and representatives of the Plaintiffs for the right to license and produce television films of Mr. Magoo for commercial purposes in the New York area to advertise the product of Liebmann Breweries, Inc. Again, drafts of proposed agreements were prepared. They are attached as Exhibits 3, 4 and 5 to the Supplemental Affidavit of Walter H. Liebman ["Exhibit F"]. They should be read in light of the executed Exhibits A, A-1, B and C to the Amended Complaint herein ["Exhibit A"]. The proposed agreements were never executed, although Exhibit B to the Amended Complaint was executed and limited the licensed area to California and the city of Yuma, Arizona.

16. Through an inadvertence, the name Liebmann Breweries, Inc., which had been included in the drafts of the agreements when they had contemplated the licensing for use in the New York Area, was left on the finally executed agreements. It is clear that this was an inadvertence, not only from the Affidavits, but also from the contracts. The language refers to Foote, Cone & Belding as the agent for Rheingold Brewing Company *and/or* Liebmann Breweries, Inc. The word *"or"* should be con-

strued to apply in the event that one or the other is not meant to be a party to the agreement. Paragraph 1 of Exhibit A to the Amended Complaint ["Exhibit A"] limits the license to use the cartoon character for the purpose of "advertising, publicizing, and promoting Client, its products and services, in the territory hereinafter specified, over television only in connection with programs sponsored in whole or in part by Client . . ."

17. Thus, when Liebmann Breweries, Inc.'s marketing territory was eliminated from the contract, it was no longer a "Client" within the contemplation of the agreement, since it could not advertise itself or its products or services in California or Arizona. Its name was left on only through an inadvertence. Liebmann Breweries, Inc., was not a party to any of the agreements.

XII.

Unless said Order and decision of the said Superior Court denying Petitioner's Motion to Quash Service of Summons be set aside by this Honorable Court, the said Honorable Superior Court will attempt to assert jurisdiction over Petitioner and deprive Petitioner by so doing of property without due process of law.

XIII.

The remedy by appeal is no plain speedy or adequate remedy in the ordinary course of law for the reason that an appeal does not lie either from the said Order for Service of Process upon the Secretary of State or from the Order denying Petitioners said Motion in the Superior Court; to compel Petitioner to submit to an unwarranted trial of said cause and then appeal from Judgment, if adverse to it, would not afford a plain or speedy

or adequate remedy in the ordinary course of law. Unless commanded by this Honorable Court to set aside the said Order for service of Process upon the Secretary of State and to quash the said Service of Summons on Petitioner in the said Superior Court action the said Honorable Superior Court, Respondent herein, and the said "Real Parties in Interest" threaten to and will proceed with the trial of the said cause.

XIV.

Your Petitioner is the party benefically interested in this Petition for Writ of Mandate, and the names of the parties who will be affected by this Petition are the Superior Court of the State of California in and for the County of Los Angeles, and the "Real Parties in Interest," namely UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, who have appeared in the said Superior Court action by and through their attorneys, Youngman, Hungate & Leopold, and Richard Hungate and Glenn Warner, 6505 Wilshire Boulevard, Los Angeles 48, California.

XV.

This Petition for Writ of Mandate is filed in the above entitled Honorable Court as an original proceeding for the reason that the said Respondent has refused and still refuses to set aside the said Order for Service of Process upon the Secretary of State and to quash the said Service of Summons upon Petitioner in the said Superior Court action, and unless restrained and compelled by this Court, will proceed with the trial of said cause, and your Petitioner has no plain, speedy or adequate remedy in the ordinary course of law.

Wherefore, your Petitioner prays:

That an Alternative Writ of Mandate issue out of and under the seal of this Honorable Court, directed to said Honorable Superior Court, commanding it to vacate and set aside its Order for service of process in the said Superior Court action upon Liebmann Breweries, Inc., by service of a copy of the Summons and Complaint in the said Superior Court action, together with a copy of the said Order on the Secretary of State of the State of California, and sending of such process and Order by the said Secretary of State to your Petitioner herein at its business address, 36 Forrest Street, Brooklyn 6, New York, and to quash, annul and set aside the alleged service of Summons upon Liebmann Breweries, Inc., your Petitioner herein, or to show cause before this Honorable Court at a specified time and place why said Respondent has not done so, and for such other and further relief to which Petitioner may be entitled.

COYLE & COOPER,

.....

By LEON M. COOPER,

Attorneys for Petitioner.

I, the undersigned, Leon M. Cooper, say:

1. I am the attorney for Liebmann Breweries, Inc., a corporation, Petitioner herein.

2. Said Liebmann Breweries, Inc., is the Petitioner in the above entitled action, and is a New York corporation and its place of business is in the City of Brooklyn, State of New York, and it has no place of business in California, and has no officers or agents in the State of California, or in the County of Los Angeles, State of California, where I have my office, and that I make this verification for and on behalf of the said party for that reason.

3. I have been informed and believe as to the allegations contained in the foregoing Petition for Writ of Mandate in the above entitled action, and upon such information and belief state that I believe these matters to be true.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9, 1959.

(s) LEON M. COOPER.

Leon M. Cooper.

Exhibit A.

Youngman, Hungate & Leopold
Richard Hungate, Glenn Warner
Attorneys for Plaintiff
6505 Wilshire Boulevard
Los Angeles 48, California

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiff vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc. and Rheingold Brewing Company, Defendant. No. 698923.

Action brought in the Superior Court of the County of Los Angeles, and Complaint filed in the Office of the Clerk of the Superior Court of said County.

SUMMONS ON AMENDED COMPLAINT.

The People of the State of California send greetings to: Foote, Cone & Belding, Inc., Liebmann Breweries, Inc. and Rheingold Brewing Company, Defendant.

You are directed to appear in an action brought against you by the above named plaintiffs in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the Amended Complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiffs will take judgment for any money or damages demanded in the Amended Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Amended Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 12th day of June, 1958.

(SEAL SUPERIOR COURT
LOS ANGELES COUNTY)

HAROLD J. OSTLY, County Clerk
and Clerk of the Superior Court
of the State of California, in
and for the County of Los An-
geles

By /s/ K. MEACHEM, Deputy.

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk.

Youngman, Hungate & Leopold
Richard Hungate
Glenn Warner
6505 Wilshire Boulevard
Los Angeles 48, California
OLive 3-0490
Attorneys for Plaintiffs

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc., and Rheingold Brewing Company, Defendants. No. 698923.

AMENDED COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT.

Cause of Action of Plaintiffs UPA Enterprises and Columbia Pictures Corporation

Plaintiffs UPA Enterprises and Columbia Pictures Corporation, and each of them, allege:

I

Plaintiff UPA Enterprises (herein called "Enterprises") was at all times herein mentioned, and now is, a California corporation. Plaintiff Columbia Pictures Corporation (herein called "Columbia" was at all times herein mentioned, and now is, a New York corporation authorized to do business in California.

II

Defendant Foote, Cone & Belding, Inc. was at all times herein mentioned, and now is, a Delaware corporation authorized to do and doing business in California. Defendant Rheingold Brewing Company was at all times herein

mentioned, and now is, a California corporation. Defendant Liebmann Breweries, Inc. was at all times herein mentioned, and now is, a corporation doing business in California.

III

On or about November 30, 1955, and concurrently with the making of the "Production Agreement" referred to in Paragraph XIV of this Complaint, defendants jointly and severally entered into a written agreement with Enterprises and Columbia, a copy of which is attached hereto, marked Exhibit A, and by this reference incorporated herein, pursuant to which defendants acquired certain rights in the fanciful character "Mr. Magoo." Likewise, on or about November 30, 1955, defendants jointly and severally entered into a written agreement with Enterprises and Columbia modifying and clarifying such agreement, a copy of which modifying and clarifying agreement is attached hereto, marked Exhibit A-1, and by this reference incorporated herein. (Such two agreements will, for convenience be referred to collectively herein as the "License Agreement.")

IV

Defendant Foote, Cone & Belding, Inc. executed the License Agreement in its capacity as agent for and on behalf of defendants Rheingold Brewing Company and Liebmann Breweries, Inc., and each of them; and also in its individual capacity for its own account, and at all times herein mentioned said defendant Foote, Cone & Belding, Inc. was a party to said License Agreement and plaintiffs, and each of them, believed it to be a party to said License Agreement, and plaintiffs are informed and believe and based upon such information and belief allege that said defendant intended to be a party to said License Agreement.

V

The original term of the license under the License Agreement was the period of two years commencing January 1, 1956. Defendants paid to Enterprises and Columbia license fees provided for in the License Agreement for the calendar years 1956 and 1957 in the amount of $60,000 only and defendants and Enterprises and Columbia, and each of them, performed each and all of the covenants and conditions to be performed by them under the License Agreement during said calendar years and each of them.

VI

On or about June 21, 1956, defendants jointly and severally entered into a written agreement (herein called the "Radio and Label Agreement") with Enterprises and Columbia amending and supplementing the License Agreement, a copy of which amendment and supplement is attached hereto, marked Exhibit B, and by this reference incorporated herein.

VII

Defendant Foote, Cone & Belding, Inc. executed the Radio and Label Agreement in its capacity as agent for and on behalf of defendants Rheingold Brewing Company and Liebmann Breweries, Inc., and each of them, and also in its individual capacity for its own account, and at all times herein mentioned said defendant Foote, Cone & Belding, Inc. was a party to said Radio and Label Agreement and plaintiffs, and each of them, believed it to be a party to said Radio and Label Agreement, and plaintiffs are informed and believe and based upon such information and belief allege that said defendant intended to be a party to said Radio and Label Agreement.

VIII

The original term of the license under the Radio and Label Agreement commenced on July 15, 1956 and was co-terminous with the term of the license under the License Agreement. Defendants paid to Enterprises and Columbia the license fee provided for in the Radio and Label Agreement for the period commencing July 15, 1956 and ending July 14, 1957, in the amount of Ten Thousand Dollars ($10,000) only and defendants and Enterprises and Columbia, and each of them, performed each and all of the covenants and conditions to be performed by them under the Radio and Label Agreement during said period. Defendants failed and refused and continue to fail and refuse to pay to Enterprises and Columbia, or either of them, the license fee provided for in the Radio and Label Agreement for the period commencing July 15, 1957 and ending December 31, 1957.

IX

On or about August 20, 1957, Enterprises and Columbia exercised the option granted to them under the License Agreement to extend the term of the license provided for in the License Agreement and in the Radio and Label Agreement for the additional year commencing January 1, 1958, by reason of which extension defendants, and each of them, became obligated to pay Enterprises and Columbia not later than January 31, 1958, the License fee for 1958 of $20,000 under the License Agreement and $10,000 under the Radio and Label Agreement. Defendants, and each of them, failed and refused to pay said license fees or either of them by January 31, 1958 and still fail and refuse to pay said license fees or either of them.

X

Enterprises and Columbia have duly performed all the covenants and conditions on their part to be performed under the License Agreement and under the Radio and Label Agreement.

XI

There is now due and owing from defendants, and each of them, to Columbia and Enterprises license fees provided for in the License Agreement and the Radio and Label Agreement in the aggregate sum of $34,583.33 no part of which has been paid.

CAUSE OF ACTION OF UPA PICTURES, INC.

Plaintiff UPA Pictures, Inc. alleges:

XII

At all times herein mentioned plaintiff UPA Pictures, Inc. (herein called "UPA") was, and now is, a California corporation.

XIII

UPA incorporates herein by reference, and alleges, each and every allegation contained in Paragraph II of this Complaint.

XIV

On or about November 30, 1955, and concurrently with the making of the License Agreement, the defendants jointly and severally entered into a written contract (herein for convenience called the "Production Agreement") with UPA, a copy of which is attached hereto, marked Exhibit C, and by this reference incorporated herein. Pursuant to the Production Agreement, defendants, and each of them, agreed to order from UPA at least eight (8) spot commercials for the year 1956 and at

least six (6) spot commercials for the year 1957, each of which was to feature the fanciful character "Mr. Magoo."

XV.

Defendant Foote, Cone & Belding, Inc. executed the Production Agreement in its capacity as agent for and on behalf of defendants Rheingold Brewing Company and Liebmann Breweries, Inc., and each of them, and also in its individual capacity for its own account, and at all times herein mentioned said defendant Foote, Cone & Belding, Inc. was a party to said Production Agreement and plaintiffs, and each of them, believed it to be a party to said Production Agreement, and plaintiffs are informed and believe and based upon such information and belief allege that said defendant intended to be a party to said Production Agreement.

XVI.

From time to time during the calendar year 1956, in accordance with the provisions of the Production Agreement, defendants ordered from UPA and UPA prepared and delivered to defendants eight (8) spot commercials.

XVII.

Defendants, and each of them, failed and refused to order from UPA any spot commercials for or as respects the year 1957 and they, and each of them, have failed and refused, and still fail and refuse, to pay UPA for such six (6) spot commercials, or any of them, for or as respects the year 1957.

XVIII.

On or about August 20, 1957 Enterprises and Columbia exercised the option granted to them under the License Agreement to extend the term of the license under the

License Agreement for the additional year of 1958. By reason of such extension the term of the production Agreement was likewise extended for the additional year of 1958, whereby defendants, and each of them, became obligated to order at least six (6) spot commercials from UPA during the year 1958.

XIX.

On or about November 26, 1957, defendants, and each of them, notified UPA in writing that neither they, nor any of them, would order or pay for such spot commercials, or any of them, for or as respects the year 1958, purported to terminate the Production Agreement, the License Agreement and the Radio and Label Agreement, and wholly repudiated said agreements and each of them.

XX.

UPA has duly performed all the covenants and conditions on its part to be performed to the date hereof under the Production Agreement, and at all times commencing January 1, 1957 and continuing to the date hereof, UPA has been ready, able and willing to prepare and deliver to defendants, and each of them, any and all of the spot commercials which defendants, and each of them, agreed to order for and as respects the calendar years 1957 and 1958 in accordance with the Production Agreement.

XXI.

UPA could have prepared and delivered to defendants said twelve (12) spot commercials which defendants agreed and were obligated to order from it under the Production Agreement for and as respects the years 1957 and 1958 at and for a total cost to UPA of $48,000, for which defendants agreed to pay to UPA the total sum of $167,400. UPA has thereby sustained damages in the

sum of $119,400 as a result of defendants' repudiation of said agreement and their failure and refusal to order or pay for such twelve (12) spot commercials, or any of them.

Wherefore, plaintiffs pray for judgment against the defendants, and each of them, as follows:

A. In favor of Enterprises and Columb :

1. In the sum of $34,583.33, together with interest thereon at the rate of seven percent (7%) per annum from February 1, 1958;

2. For their costs of suit herein; and

3. For such other relief as the court may deem proper.

B. In favor of UPA:

1. In the sum of $119,400, together with interest thereon at the rate of seven percent (7%) per annum from the date hereof;

2. For its costs of suit herein; and

3. For such other relief as the court may deem proper.

YOUNGMAN, HUNGATE & LEOPOLD
By /s/ RICHARD HUNGATE
Attorneys for Plaintiffs

EXHIBIT A.

November 30, 1955

UPA Enterprises, Inc.
and Columbia Pictures Corporation
Los Angeles, California.

Gentlemen:

Your signature in the space below will confirm the following agreement made between us, on behalf of our client, Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called "Client"), and you this date:

A. You represent and warrant that you are the sole owners of all rights in and to the name, character, characterization, voice, likeness and other elements of "Mr. Magoo" (all of which are herein collectively called "Mr. Magoo"), that you have the right to grant to us the rights herein set forth, and that you have not heretofore entered into and will not hereafter enter into any agreements which would impair or interfere with [or diminish the value to us of] the rights herein granted.

B. For good and valuable consideration, receipt whereof is hereby acknowledged, you have heretofore granted to us an option to enter into an agreement with you upon all of the terms and conditions hereinafter set forth, which option was exercisable by us at any time, but not later than 48 hours (exclusive of Saturdays, Sundays and holidays) after the delivery to Client in New York City of the storyboards referred to in the introductory paragraph of the agreement between us and UPA Pictures, Inc. (herein called "UPA") entered into concurrently herewith (herein called "production agreement"). You acknowledge that we have duly exercised the fore-

going option, and, accordingly, the terms and conditions hereinafter set forth apply.

1. You grant to us the exclusive right and license during the term hereof, and for a period of 30 days thereafter with respect to material authorized or released during the term, to use "Mr. Magoo" for the purpose of advertising, publicizing and promoting Client, its products and services, in the territory hereinafter specified, over television only in connection with programs sponsored in whole or in part by Client, and in newspapers (other than comic strips which are specifically excluded herefrom) and display media. (For purposes of clarification, the words "comic strips" shall not be deemed to include cartoons confined to paid advertising space exclusive of comic pages in daily or Sunday papers). The territory covered by this agreement shall be the state of California (including for this purpose, as to television, the California signal area, even though reception may incidentally be had outside the state of California, and as to newspaper and display media, uses made or distributed in California, and also newspapers published in California, even though there may be occasional distribution thereof in other areas).

2. The term hereof (herein referred to as "the term" and sometimes as "the original term") shall commence on January 1, 1956 and shall continue to and including December 31, 1957, each calendar year thereof being referred to herein as a "year of the term." You shall have an option to extend the term for an additional period of one year, commencing on January 1, 1958 (herein called "extended term") by giving us notice in writing of your intention so to do not later than September 30, 1957; provided, however, that if you exercise the option herein granted and we do not desire the term to continue during

the extended term we may nonetheless terminate the term effective as of the expiration of the original term by notice in writing to you not later than 30 days prior to the expiration of the original term, accompanied by payment to you of the amount which would have been payable under paragraph 3 hereof if the extended term had become effective and by payment to UPA Pictures, Inc. of the amount specified in the production agreement.

3. For the rights granted to us hereunder we agree to pay to you the following:

(a) During the original term, the sum of $60,000.00, of which $40,000.00 has been paid to you concurrently herewith, receipt of which is hereby acknowledged, and the balance shall be payable within 30 days after the commencement of the second year of the term.

(b) For the extended term (if the extended term becomes effective as provided in paragraph 2), the sum of $20,000.00, payable within 30 days after the commencement of the extended term.

Payment shall be made jointly and shall be delivered to you and we shall have no obligation to see to the application of the proceeds as between you.

4. The rights granted to us shall be exclusive with respect to beer and beer products only, within the territory, during the term, and you agree not to authorize or permit use of "Mr. Magoo" contrary to the exclusivity provisions herein set forth. You further agree not to authorize or permit the use of "Mr. Magoo" in entertainment films of a character detrimental to the products, name or advertising of Client. (For example, you will not authorize or permit "Mr. Magoo" to appear as a proponent of the WCTU, or to be portrayed so as to lead the public to be-

lieve that he has been drinking immoderately, or as belittling the "Miss Rheingold Contest," or otherwise causing ridicule or embarrassment to Client). You shall not, however, be responsible for any casual or inadvertent failure to comply with the foregoing, or any failure due to acts of third persons beyond your control, but you shall endeavor to correct the same when notified thereof in writing. It is specifically agreed that except as aforesaid, all rights not herein exclusively granted to us are reserved by you and may be exercised freely by you and shall be deemed non-competitive to the rights herein granted.

5. We agree to give credit to UPA and to Columbia Pictures Corporation on all printed material, other than point-of-sale material, in size of type at least 15% of the size of the credit to "Mr. Magoo," which credit shall read, substantially, as follows:

> "See Mr. Magoo at your favorite theatre, Columbia Pictures Corporation-UPA Pictures, Inc. release."

We shall not, however, be responsible for any casual or inadvertent failure to accord you the credit hereinabove specified, or any failure due to acts of third persons beyond our control, but we shall endeavor to correct the same when notified thereof in writing.

6. We agree to affix or cause to be affixed to all copyrightable uses of "Mr. Magoo" a copyright notice in the form hereafter specified or such other form as you may hereafter designate by notice in writing to us. In connection with all copyrightable uses of "Mr. Magoo" which shall consist of works of art, reproductions of works of art, drawings, photographs and pictorial illustrations, including prints or labels used for articles of merchandise, the copyright notice shall be in the following form:

"© United Productions of America." In all other copyrightable uses of "Mr. Magoo" the copyright notice shall be in the form above specified, together with a date, which date shall be the date of first publication of the use involved, unless you notify us in writing that some other date should be used. We understand that United Productions of America is changing its corporate name and when directed by you in writing we will, as to uses of "Mr. Magoo" made thereafter, cause the new name to be inserted in copyright notices in lieu of the name, United Productions of America, in accordance with your instructions. We will cooperate with you in obtaining registration of any claim to copyright with the Register of Copyrights where you so direct, but at your cost.

7. We acknowledge that it is of basic importance to you to maintain "Mr. Magoo" as a unique character of distinctive nature and appeal, and we therefore agree that all uses in film and/or art work with respect to "Mr. Magoo" shall not be detrimental to the character of "Mr. Magoo" and for this purpose shall be subject to approval of UPA, and all films and art work, as well as sound and other incidental material in which we may require in connection with "Mr. Magoo" shall be done by UPA. We shall reimburse UPA for the foregoing UPA standard cost for new art work and at its out-of-pocket costs for sound and other incidental material, provided only that where feasible we may, subject to approval of UPA, use art work taken directly from television films made by UPA pursuant to the production agreement.

8. Any notices which you may desire to give us under this agreement shall be deemed duly given when personally served upon one of our officers or when deposited in the United States mails, postage prepaid, addressed to us at

the address specified below our signature, or at such other address as we may from time to time designate in writing. Any notice which we may desire to give to you under this agreement shall be deemed duly given to each of you when personally served upon an officer of each of you or when duplicate copies of such notice are deposited in the United States Mails, postage prepaid, addressed to each of you at the addresses specified below your signatures, or at such other address as may from time to time be designated in writing. Any notices given as aforesaid shall be deemed duly served upon deposit thereof in the United States mails.

Kindly indicate your approval and acceptance of the foregoing by signing in the space hereinbelow provided.

Very truly yours,

FOOTE, CONE & BELDING, INC.

By FRANK E. DELANO

Address: 900 Wilshire Boulevard
Los Angeles 17, California

APPROVED AND ACCEPTED:

UPA ENTERPRISES, INC.

By STEPHEN BOSUSTOW

Address: 4440 West Lakeside Avenue
Burbank, California

COLUMBIA PICTURES CORPORATION

By .....[Illegible].....
Vice Pres.

Address: 729 Seventh Avenue New York, New York

EXHIBIT A-1

UPA Enterprises, Inc.
and Columbia Pictures Corporarion
Los Angeles, California

Gentlemen:

This will refer to the License Agreement between you and us dated November 30, 1955 licensing the use by Rheingold Brewing Company and/or Liebmann Breweries, Inc. of the character "Mr. Magoo" and also to a related agreement called the Production Agreement between UPA Pictures Inc. and Foote, Cone & Belding, Inc., dated November 30, 1955.

You and we wish to modify and clarify the License Agreement in certain respects as hereinafter set forth and it is therefore agreed as follows:

1. There shall be deleted from the eighth line of Paragraph A of the License Agreement the words "or diminish the value to us of."

2. The television rights in respect of "Mr. Magoo" as set forth in Article 1 of said agreement shall be deemed limited solely to the use of the sixty (60) second commercials provided to be delivered in accordance with the Production Agreement. So much of Article 1 of said agreement which relates to newspaper rights shall be deemed deleted therefrom and in the place and stead thereof, you agree that we shall have the right only to use said character in newspapers as follows: In paid advertising calling attention to the television programs in which the aforesaid commercials appear; in such advertising said character may be used in a single panel cartoon which shall be without continuity, i.e. not telling a story, between prede-

cessor and successive cartoons. In all other respects, said Article 1 remains unchanged.

Kindly indicate your approval and acceptance of the foregoing by signing in the space hereinbelow provided.

Very truly yours,

FOOTE, CONE & BELDING, INC.
By FRANK E. DELANO
Address: 900 Wilshire Boulevard
Los Angeles 17, Calif.

APPROVED AND ACCEPTED:
UPA ENTERPRISES, INC.
By STEPHEN BOSUSTOW
Address: 4440 West Lakeside Avenue
Burbank, California

COLUMBIA PICTURES CORPORATION
By L. JAFFE
Vice Pres.
Address: 729 Seventh Avenue
New York 19, New York

Form approved: DOD; commitment appr'd: ED.

EXHIBIT B.

UPA Pictures, Inc.

June 21, 1956

UPA Enterprises
and Columbia Pictures Corporation
Los Angeles, California

Gentlemen:

Reference is hereby made to that certain agreement, as amended, entered into between you and us on November 30, 1955, hreinafter referred to as the "Licensing Agreement," whereby you granted to us on behalf of our Client, Rheingold Brewing Company and/or Liebmann Breweries, Inc., certain rights in and to your cartoon character "Mister Magoo. You and we now desire to enter into an agreement respecting the use of "Mister Magoo" on beer bottle neck labels or neck wraps and in connection with markings on beer can tops and or bottoms and in connection with radio broadcasting, and do agree as follows:

1. Paragraph 1 of the Licensing Agreement relating to the territory thereof is hereby amended to incorporate the City of Yuma, Arizona, within the territory. No other term or condition of the Licensing Agreement shall be deemed amended or modified by this paragraph.

2. You hereby grant to us the exclusive right and license to use the name and likeness of "Mister Magoo" in connection with neck labels or neck wraps on beer bottles and markings on beer can tops and/or bottoms.

(a) The territory of this license shall be the State of California (including the City of Yuma, Arizona) only.

(b) The term of this license shall commence on July 15, 1956, and shall continue for a period of time concurrently with the term of the Licensing Agreement and sub-

ject to all provisions of the Licensing Agreement relating to the term or extensions thereof.

(c) For the rights granted to us hereunder we agree to pay to you the sum of Five Thousand ($5,000.00) Dollars per year during each year (and pro rata for the portion of the last year of the term prior to the expiration thereof) of the term hereof. It is understood and agreed, however, that in the event you exercise your rights to extend the term of the Licensing Agreement for a third year, and we elect to pay the sum stipulated in paragraph 2 of the Licensing Agreement to terminate the Licensing Agreement, then and in that event, the term of this agreement shall be deemed terminated without further obligation on our part for the rights granted herein as respects said third year.

(d) All artwork required in connection with the exercise of rights granted herein shall be done for us by UPA Pictures, Inc. at their standard studio rate for artwork. It is understood that the charges for designing neck labels or neck wraps on beer bottles and markings on beer can tops and/or bottoms, and preparation of finished artwork for same will not exceed Five Hundred ($500.00) Dollars.

3. It is understood and agreed that, in addition to the rights to use "Mister Magoo" now or heretofore granted to us, we shall have the right to use "Mister Magoo" in radio broadcasting (other than in "network" broadcasting as the term is commonly understood in the industry), subject to the following:

(a) The right granted herein is limited to the use of "Mister Magoo" in commercial announcements, none of which shall exceed sixty (60) seconds in length.

(b) The territory of this license shall be the State of California (including the City of Yuma, Arizona) only.

(c) The term of this license shall commence on July 15, 1956 and shall continue for a period of time concurrently with the term of the License Agreement, and subject to all provisions of the License Agreement relating to the term or extensions thereof.

(d) Any text material which we propose to use in connection with such commercial announcements shall be subject to the prior approval of UPA Pictures, Inc.

(e) We will contract directly with voice actors to be used in connection with the commercial announcements. However, we will not enter into a contract with any voice actor depicting the voice of "Mister Magoo" without UPA Pictures, Inc. approval of such actor first had and obtained. This approval once granted, may be withdrawn at any time if UPA Pictures, Inc. feels the characterization of "Mister Magoo" by such actor might be detrimental to their use of "Mister Magoo."

(f) For the rights granted herein we shall pay you the following:

(i) Five Thousand ($5,000.00) Dollars per year (or pro rata for the portion of the last year of the term prior to the expiration thereof) for the rights granted herein as respects the exercise thereof in the State of California (including the City of Yuma, Arizona) for a term to begin on July 15, 1956 and to continue until the termination of the Licensing Agreement.

(ii) In the event you exercise your right to extend the term of the Licensing Agreement for a third year, and we elect to pay the sum stipulated in paragraph 2

of the Licensing Agreement to terminate the Licensing Agreement then, and in that event, the term of this agreement as respects the rights granted herein, shall be deemed terminated without further obligation on our part as respects said third year.

4. All terms and conditions of the Licensing Agreement not inconsistent with the terms herein set forth, including, but not by way of limitation, the provisions relating to copyright notices, are deemed a part hereof as though fully set forth herein.

Your signatures, together with ours, hereinbelow, will constitute this a binding and enforceable agreement between us.

Very truly yours,

FOOTE, CONE & BELDING, INC.,
By FRANK E. DELANO

ACCEPTED AND AGREED TO:
UPA ENTERPRISES
By S. BOSUSTOW
President

COLUMBIA PICTURES CORPORATION
By JM

[Form approved: DOD; commitment approved: /s/ ED, NU.]

EXHIBIT C.

November 30, 1955.

UPA Pictures, Inc.
4440 Lakeside Drive
Burbank, California

Gentlemen:

Your signature in the space below will confirm the following agreement made between us, on behalf of our client, Rheingold Brewing Company and/or Liebmann Breweries, Inc., (herein called "Client"), and you this date:

You have heretofore prepared and delivered to Client in New York City, 4 finished storyboards of 60 seconds each in length, built around the character "Mr. Magoo"; and we have duly advised you that we desire to proceed with the production of filmed television commercials (herein called "commercials") built around "Mr. Magoo." Accordingly, all of the terms and conditions herein set forth shall apply:

1. The term of this agreement shall commence January 1, 1956 and shall continue for a term which shall run concurrently with the term of an agreement between UPA Enterprises, Inc., Columbia Pictures Corporation and us with respect to the rights in the character "Mr. Magoo" being entered into concurrently herewith (herein called the "license agreement").

2. When preliminarily approved by us, you will prepare and deliver to us in New York finished storyboards which, when submitted, will be 60 seconds each in length, as ordered by us. We shall have a period of 48 hours (exclusive of Saturdays, Sundays and holidays) after delivery of the finished storyboards in New York within which to approve or disapprove of same. If for any rea-

son whatsoever we should reject any finished storyboard pursuant to our right of approval or rejection herein, this agreement, as respects such story board, shall terminate effective with such rejection, in which event it is agreed that the initial progress payment under paragraph 3 hereof shall constitute full and final payment for the work done to date, and the rights in such storyboard shall remain vested in you, provided that you shall not use such storyboard based upon or embodying our material or any similar storyboard, or permit the same to be used by any other person, firm or corporation.

3. If we approve the finished storyboards as submitted or with changes as agreed to, you agree to produce and furnish commercials conforming to said finished storyboards, subject to the provisions hereinafter set forth, and deliver the same and all rights herein provided for to us at a price of $155.00 net per filmed foot, plus the cost of music, if any, for the commercials. The price herein specified shall be payable in installments, as follows:—25% upon order of storyboards; 25% upon approval of finished storyboards; 25% upon approval of rough animation reels; 25% upon delivery of answer prints. You acknowledge that we have paid to you concurrently herewith the sum of $15,000.00 which shall be applied against the price for the first 4 commercials hereunder. The price hereinabove specified shall be subject to increase to the extent that your cost for the commercials is increased by reason of industry-wide increases in any union scale as a result of a collective bargaining agreement, or increases in federal, state, old age, unemployment or disability insurance, taxes or contributions, or increases in contributions or payments required by a labor union or guild for union health, welfare or similar funds, over the amounts presently required

to be paid for any of the foregoing. The price, however, shall not include city or state sales taxes which may be applicable to the commercials or prints thereof delivered hereunder, which applicable taxes we agree to pay.

The foregoing price shall include: your supplying all persons and material necessary for the production of the commercials, including the voice of "Mr. Magoo"; all sessions and unit payments required under the 1955 Producers-Screen Actors Guild Codified Basic Agreement for Filmed Commercials (herein called "SAG agreement"), and any other applicable union agreement; storyboard services, creative photography and recording work and production items; copyright and music clearances; negative (picture and sound) photographed in 35/mm, black and white and 16/mm. reduction negative, of highest technical quality in all respects, complete in all details in first class condition, and all cuts and trims; and delivery of one 16/mm and one 35/mm release prints in black and white, in first class condition (herein called "the required prints"). If we notify you at the time of placing our order that we desire these commercials to be filmed in color and the required prints to be color prints, you will deliver the same at an increase in price of 20% over the price hereinabove specified.

We will pay all use fees required under the SAG agreement at scale.

4. During the first year of the term, we agree to order at least eight 60 seconds commercials. During the second year of the term, we agree to order at least six 60 seconds commercials. If the term of the license agreement is continued for the extended term (as the same is defined in the license agreement), we agree to order

at least six 60 seconds commercials during the extended term. If, however, you exercise your option for the extended term and nonetheless, we elect to terminate the term of the license agreement and of this agreement at the end of the original term, in lieu of our obligation under the preceding sentence, we agree to pay to you the sum of $30,000.

Answer prints (35/mm, black and white) for the commercials will be delivered by you on the following schedule:—Where several finished storyboards are approved as a group, the answer print for the first commercial based on one of such finished storyboards shall be delivered not later than ten weeks after approval of the storyboard therefor, and answer prints for the other commercials based on the storyboards approved as a group will be delivered not later than at three-week intervals thereafter. You will use your best efforts to process and deliver release prints for the commercials as quickly as possible after approval of answer prints. You acknowledge that 4 finished storyboards have been approved by us and will deliver the answer prints therefor in accordance with the above schedule.

5. You will, so long as we permit you to retain possession of the negatives of the commercials, store the same in a fireproof vault at your expense, and strike off as many prints thereof as we request in writing from time to time and skip such prints in accordance with our instructions at a cost to us which will not exceed $10.35 for each 16/mm or 35/mm print, less usual quantity discounts, in addition to your reasonable out-of-pocket, direct costs in connection with such shipping, which costs must be billed to us by you in quadruplicate, accompanied by way bills.

6. In no event will you proceed with principal photography of the commercials until all basic production conditions have been approved by us. The rough animation reels and answer prints shall be exhibited to us and be subject to our written approval as to conformity to storyboards. In the event of any delay in our approval or disapproval of finished storyboards, rough animation reels or final answer prints, any additional costs occasioned thereby, including standby charges, will be charged to us.

You warrant that you will, prior to commencement of production of the commercials, secure and maintain at all times during such production, at your expense, adequate public liability insurance covering injury to persons or damage to property arising out of such production, with us and Client being covered as insured, and that you will, from commencement of production of the commercials and thereafter, so long as the negatives remain in your possession, keep the same fully insured against fire, theft and other loss customarily included in extended insurance coverage, at your expense, including us and Client as insureds.

7. You represent and warrant that:

(a) Subject to the provisions of the license agreement, you are qualified to perform as required hereunder, there are no agreements preventing you from fulfilling this agreement, and the commercials and the material therein or otherwise supplied by you hereunder will not infringe upon or violate the legal rights of others, and particularly will not violate or infringe any trade marks, copyright, right of privacy of, or libel or slander, any party or be subject to any claim of lien or unpaid compensation, or be subject to any other

matter or thing whatsoever which will in any way interfere with or diminish the use by, or the value to, us or Client, of the commercials, or the material supplied by you hereunder or the ownership thereof; our rights to use the commercials, sound track thereof and drawings and characters created by you and depicted in the commercials shall be limited by and co-extensive with the provisions of the license agreement.

Subject to your ownership of "Mr. Magoo" and to our rights to use the same only in accordance with the provisions of the license agreement, we will be the sole, exclusive and unlimited owner of the commercials (including all negatives and prints thereof, and the original and conformed sound tracks), and all material therein, including the original storyboards and all material supplied by you hereunder (whether or not incorporated in the commercials, and of all rights in connection therewith, including, but not limited to, the right to copyright the commercials and the material.

(b) Subject to our obligation under the last sentence of paragraph 3 hereof, the commercials will be clear and free of all claims and encumbrances of any kind whatsoever, and will contain such union seals, labels and clearances required for exhibition or telecasting of the films by us to the public, and be produced by you in compliance with all rules and regulations of unions having competent jurisdiction over persons rendering services in connection with production of the commercials.

(c) All reports, contributions, payments and taxes to be made and paid with respect to the persons, materials or facilities furnished by you in connec-

tion with the commercials, including, but not limited to, income taxes, withholding taxes, social security, unemployment insurance, old age pensions, workmen's compensation legislation or other and similar legislation, whether now in force and effect or hereafter enacted, will be made by you, and you will observe all requirements imposed by law upon employers. All contracts entered into by you hereunder, whether contracts of employment or otherwise, will be entered into by you as principal and you will not be deemed to be acting as our or the Client's agent in negotiating or entering into such contracts.

(d) You will procure from the players and standard form written contract required by the SAG agreement completely filled out and containing a specific provision that compensation in excess of the minimum amounts provided for in the SAG agreement paid to a player for his services in making the commercials or for any use or period of use thereof may be credited by you or us or Client against any use fees payable to such player. You will deliver to us concurrently with the delivery of the required prints a copy of each such contract, together with (i) schedule showing the gross amount paid by you to such player for his services in making the commercials and the portion in excess of the minimum amounts provided for in the SAG agreement, and (ii) two completely filled in and signed W-4 forms for the player (on which the marital status of each player is indicated).

You agree to indemnify and hold us and Client, and our and their directors, officers, employees and other

persons connected with the commercials, and all television networks and the individual stations over the facilities of which the commercials are broadcast, free and harmless of and from any and all liabilities from claims, demands and actions, including attorney's fees incurred based upon any violation or alleged violation of the foregoing representations and warranties or arising out of the production, television broadcast or other use of the commercials under this agreement. The foregoing warranties shall not be deemed to apply to material supplied by us or Client, nor to any claim for compensation of persons supplied by us or Client, and as to any of the foregoing supplied by us or Client, we make similar warranties to you and agree to indemnify you with respect thereto to the same extent that you have agreed to indemnify us and Client under the preceding portions of this paragraph 7.

8. In the event that you are unable to use Jim Backus as the voice of "Mr. Magoo" due to the death or disability of said Jim Backus, or for any other reason whatsoever, you will supply a suitable substitute, subject to our reasonable approval; provided, however, that in the event of disapproval as to such substitute, your decision shall be final.

Your screen trade mark may appear on the commercials; provided, however, that the same is not included in the portion of the commercials which is telecast.

9. You are producing the commercials as an independent contractor and not as our or the Client's agent or employee. Notwithstanding anything to the contrary here-

under, neither we nor the Client will have any right to control or direct the details, means, manner or method of performance of your obligation hereunder. No waiver by us of any breach of this agreement shall be deemed to be a waiver of any other provision of this agreement. Neither we nor the Client is obligated to use the commercials; our, and the Client's only obligation being to pay the price as and when required hereunder. We may assign our rights hereunder, or any part thereof, to any reputable person, firm or corporation who may be designated by Client as its agents in our place and stead. This agreement shall be construed as an agreement executed and to be performed in the State of California.

10. Any notice which we may desire to give you under this agreement shall be deemed given when personally served upon one of your officers or when deposited in a receptacle provided for under the postal laws of the United States, postage prepaid, addressed to you at the address which appears first above. The date of deposit of any notice so addressed in the United States mail shall be deemed the date of service thereof.

Very truly yours,

FOOTE, CONE & BELDING, INC.

By FRANK E. DELANO

APPROVED AND ACCEPTED:

UPA PICTURES, INC.

By STEPHEN BOSUSTOW

State of California County of Los Angeles,—ss.

Stephen Bosustow being by me first sworn, deposes and says: that he is the President of UPA Pictures, Inc., a corporation, and UPA Enterprises, a corporation, who are plaintiffs in the above entitled action; that he has read the foregoing Amended Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon.....information or belief, and as to those matters he believes it to be true.

/s/ STEPHEN BOSTUSTOW,
STEPHEN BOSTUSTOW

Received copy of the within Amended Complaint this 11th day of June 1958

.....

Attorneys for Defendants

Exhibit B.

Youngman, Hungate & Leopold
Richard Hungate, Glenn Warner
6505 Wilshire Boulevard
Los Angeles 48, California
OLive 3-0490
Attorneys for Plaintiffs

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc., and Rheingold Brewing Company, Defendants. No. 698923.

ORDER FOR SERVICE OF PROCESS UPON SECRETARY OF STATE

Upon reading and filing the Declaration of Richard Hungate, and it satisfactorily appearing therefrom to me that the defendant Liebmann Breweries, Inc. is a foreign corporation with a place of business at 36 Forrest Street, Brooklyn 6, New York, and that said defendant has not filed with the Secretary of State of California any part of the statement required by Section 6403 of the Corporations Code or any designation of an agent for service of process, and it further appearing that diligent effort and search have indicated that neither any office nor any officer of said defendant can be found in this State on which or upon whom service of process might be made,

NOW, THEREFORE, IT IS HEREBY ORDERED that service of process in the above entitled action upon defendant

Liebmann Breweries, Inc. be made by personal delivery of a copy of the summons and complaint therein, together with one copy of this Order, to the Secretary of State or to an assistant or deputy secretary of state, and that such process and Order then be sent by the Secretary of State to said defendant Liebmann Breweries, Inc. at its business address at 36 Forrest Street, Brooklyn 6, New York.

DATED this 28th day of November, 1958.

A. EDWARD NICHOLS
Court Commissioner
Los Angeles County
Judge of the Superior Court

Exhibit C.

Coyle and Cooper
742 South Hill Street
Los Angeles 14, California
MAdison 7-9077
Attorneys for Defendant Liebmann Breweries, Inc.

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc., and Rheingold Brewing Company, Defendants. No. 698923.

STIPULATION EXTENDING TIME WITHIN WHICH TO MOVE TO QUASH SERVICE OF SUMMONS AND ORDER EXTENDING TIME WITHIN WHICH TO MOVE TO QUASH SERVICE OF SUMMONS (Code of Civil Procedure, Section 416.1)

IT IS HEREBY STIPULATED by and between the Plaintiffs, by and through their counsel, Youngman, Hungate & Leopold, Richard Hungate and Glenn Warner, and the Defendant Liebmann Breweries, Inc., appearing specially only by and through its counsel, Coyle and Cooper, as follows:

1. That this Stipulation shall not constitute a general appearance by the Defendant Liebmann Breweries, Inc. in the above entitled action, but only a special appearance in connection with the making of the Motion described herein;

2. That the time within which the Defendant Liebmann Breweries, Inc. may serve and file a Notice of Motion to

Quash the Service of Summons upon it, upon the ground of lack of jurisdiction of the above named Honorable Court under it, shall be until January 23, 1959;

3. This Stipulation may, but need not be filed in Court.

DATED: Jan. 2, 1959.

YOUNGMAN, HUNGATE & LEOPOLD,
RICHARD HUNGATE and GLENN WARNER
By /s/ RICHARD HUNGATE
Attorneys for Plaintiffs

COYLE and COOPER
By /s/ LEON M. COOPER
Attorneys for Defendant Liebmann Breweries, Inc.

GOOD CAUSE APPEARING THEREFORE, IT IS ORDERED that the Defendant Liebmann Breweries, Inc., appearing specially only for the purpose of the Motion described in the above Stipulation, and without submitting itself to the jurisdiction of this Court, shall have until January 23, 1959 within which to serve and file its Notice of Motion to Quash the Service of Summons upon the Defendant Liebmann Breweries, Inc. upon the ground of lack of jurisdiction of this Court over it.

DATED: Jan. 5, 1959.

JOSEPH G. GORMAN
Court Commissioner
Los Angeles County
Judge of the Superior Court

Original of this document filed Jan. 5, 1959 in the Office of County Clerk Los Angeles.

Exhibit D.

Coyle and Cooper
732 South Hill Street
Los Angeles 14, California
MAdison 7-9077
Attorneys for Defendant Liebmann
Breweries, Inc.

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc., and Rheingold Brewing Company, Defendants. No. 698923.

NOTICE OF MOTION TO QUASH SERVICE OF SUMMONS UPON LIEBMANN BREWERIES, INC.

To Plaintiffs UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, and to Youngman, Hungate & Leopold, Richard Hungate and Glenn Warner, their attorneys:

PLEASE TAKE NOTICE that on Friday, January 30, 1958, at 9:00 o'clock A.M. of said day, or as soon thereafter as counsel may be heard, in the Courtroom of Department 67, in the New County Courthouse, 111 North Hill Street, City of Los Angeles, State of California, the Defendant Liebmann Breweries, Inc., by Coyle and Cooper, its attorneys, appearing specially for the purposes of this Motion only, and without submitting itself to the jurisdiction of the above named Honorable Court, and for no other purpose, will move the above named Honorable Court:

1. To vacate and set aside its Order for service of process in the above entitled action upon the Defendant Liebmann Breweries, Inc. by service of a copy of the Sum-

mons and Complaint in the above entitled action, together with a copy of the said Order on the Secretary of State of the State of California, and sending of such process and Order by the said Secretary of State to the said Defendant at its business address, 36 Forrest Street, Brooklyn 6, New York; and

2. That the alleged service of Summons upon Liebmann Breweries, Inc. in the above entitled action be quashed, annulled, and set aside.

The foregoing Motion will be made on the grounds that Liebmann Breweries, Inc. is organized under and by virtue of the laws of the State of New York; that it never has and does not now transact any corporate or other business within the State of California; that it does not maintain any agent, officer or other person in the State of California upon whom service of Summons can be made; that said alleged service in this action was attempted to be made by serving a copy of the original thereof upon the Secretary of State of the State of California, which is not authorized by Liebmann Breweries, Inc. to accept the service of process for or on its behalf.

Said Motion will be made and based upon this Notice, the Affidavit of Walter H. Liebmann in Support of this Motion, Points and Authorities in Support of this Motion and the records and files in the above entitled case, and any other affidavits, declarations or documents which may be filed in this case prior to the hearing of said Motion.

DATED: January 22nd, 1959.

COYLE and COOPER

By /s/ LEON M. COOPER

LEON M. COOPER

Attorneys for Defendant

Liebmann Breweries, Inc.

Exhibit E.

Coyle and Cooper
742 South Hill Street
Los Angeles 14, California
MAdison 7-9077
Attorneys for Defendants

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc., and Rheingold Brewing Company, Defendants. No. 698923.

AFFIDAVIT OF WALTER H. LIEBMAN IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS

State of New York, County of New York—ss.

Comes now Walter H Liebman and having been duly sworn, deposes and says:

1. That he is Vice President and General Counsel of Liebmann Breweries, Inc., a New York corporation;

2. That on or about December 15, 1958, he received a letter dated December 10, 1958 from the Secretary of State of the State of California addressed to Liebmann Breweries, Inc., advising that on or about December 9th, 1958 copies of a Summons on Amended Complaint and Amended Complaint and an Order for Service and Process upon the Secretary of State in the above entitled action were delivered to the Secretary of State of the State of California for the purported purpose of serving Liebmann Breweries, Inc. That thereafter he communicated with Mr. Leon M. Cooper of the firm of Coyle and Cooper attorneys licensed to practice law in the State of Cali-

fornia, to represent Liebmann Breweries, Inc. in order to appear specially for the purpose of making a Motion to Quash the Service of Summons in the above entitled action, as aforesaid;

3. That he makes this Affidavit in support of said Motion to Quash Service of Summons on Liebmann Breweries, Inc.;

4. That Liebmann Breweries, Inc. is a corporation organized under the laws of the State of New York; that the location of its principal office is 36 Forrest Street, Brooklyn 6, New York; that its officers and directors reside either in the State of New York or close to the New York Metropolitan Area and outside of the State of California;

5. That the corporate affairs connected with Liebmann Breweries, Inc. are conducted at its principal place of business, 36 Forrest Street, City of Brooklyn, State of New York;

6. That the business of Liebmann Breweries, Inc. is brewing and selling beer and selling the by-products from the manufacture of beer; that this business is carried on principally in the State of New York; that none of the business of Liebmann Breweries, Inc. is carried on, or ever has been carried on, in the State of California;

7. That in order to carry on its business, it is necessary for Liebmann Breweries, Inc. to obtain permits and licenses from the authorities supervising the sale of alcoholic beverages in the various states in which it does business; that Liebmann Breweries, Inc. has obtained such licenses

and permits from the authorities concerned in the State of New York; that Liebmann Breweries, Inc. does not now, nor has it ever held a license to manufacture or sell or import beer or other alcoholic beverages in or into the State of California;

8. Liebmann Breweries, Inc. has never advertised its beer or any of its beer products for sale in the State of California; Liebmann Breweries, Inc. has never solicited or offered its beer or any of its beer products for sale in the State of California; Liebmann Breweries, Inc. has never distributed its products in the State of California;

9. Liebmann Breweries, Inc. has never maintained an office or place of business in California, nor has it ever owned an inventory or maintained a warehouse in California;

10. Liebmann Breweries, Inc. has never filed its Articles of Incorporation with the Secretary of State of the State of California or with the County Clerk of any county in the State of California; Liebmann Breweries, Inc. has never filed with the Secretary of State in the State of California any statement in the manner and form of California Corporations Code, Section 6403; Liebmann Breweries, Inc. has never designated an agent for the service of process in the State of California; Liebmann Breweries, Inc. has never located any office for doing business within the State of California; Liebmann Breweries, Inc. has never designated by any means whatsoever any agent in the State of California upon whom process, directed to Liebmann Breweries, Inc., may be served.

11. Liebmann Breweries, Inc. has never entered into any contract with the Plaintiffs, or any of them, in the above entitled action for the licensing of Liebmann Breweries, Inc. for the use of the fanciful character named "Mr. Magoo" in television spot commercials or otherwise for the purpose of advertising the sale of Rheingold Beer in the State of California;

12. Liebmann Breweries, Inc. has never entered into a contract with the Plaintiffs in the above entitled action, or any of them, for production by the Plaintiffs, or any of them, of television spot commercials;

13. Foote, Cone & Belding, Inc. has never been the agent for, or on behalf of, nor has it ever had any authority to act for or on behalf of Liebmann Breweries, Inc. in connection with the production of television spot commercials for the sale of Rheingold beer in the State of California, or for the purpose of distributing television spot commercials throughout the State of California, or for the purpose of promoting the sale of Rheingold beer in the State of California.

14. Liebmann Breweries, Inc. has never paid corporate, franchise, or sales or use taxes, or real or personal property taxes in or to the State of California, or any of its governmental subdivisions.

15. Liebmann Breweries, Inc. has never engaged in business in California in any manner; nor has it ever in California engaged in the business of supervising the production of television spot commercials, nor has it ever engaged in California in the business of distributing tele-

vision spot commercials throughout California, nor has it ever engaged in California in the business of causing said television commercials to be viewed by the public in the State of California for the purpose of promoting the sale of Rheingold Beer in the State of California;

16. Liebmann Breweries, Inc. is not now doing business nor, has it ever done business, in the State of California;

17. By reason of all of the foregoing Liebmann Breweries, Inc. should not be amenable to the service of process within the State of California in the above entitled litigation, pursuant to the provisions of California Corporations Code, Sections 6501 to 6503.

WHEREFORE, your affiant prays that the Motion of Liebmann Breweries, Inc. to quash service of Summons in the above entitled action be granted.

/s/ WALTER H. LIEBMAN
WALTER H. LIEBMAN

Subscribed and sworn to before me this 5th day of January, 1959.

/s/ FRANCES McNALLY
Notary Public in and for said
County and State

State of California, County of Los Angeles,—ss.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 742 South Hill Street, Los Angeles 14, California On the 22nd day of January, 1959, I served the within Affidavit of Walter H. Liebman in Support of Motion to Quash Service of Summons on the Plaintiffs in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Los Angeles, California addressed as follows:

Youngman, Hungate & Leopold
6505 Wilshire Boulevard
Los Angeles 48, California

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on January 22, 1959 at Los Angeles, California.

/s/ TERESA WEEKS

*Both the verification and proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

Exhibit F.

Coyle and Cooper
742 South Hill Street
Los Angeles 14, California
MAdison 7-9077
Attorneys for Defendants

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprise and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc. and Rheingold Brewing Company, Defendants. No. 698923.

SUPPLEMENTAL AFFIDAVIT OF WALTER H. LIEBMAN IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS

State of New York, County of New York,—ss.

COMES NOW WALTER H. LIEBMAN, and having been duly sworn, deposes and says:

1. That he makes this Supplemental Affidavit in order to set forth facts in addition to those set forth in his Affidavit in Support of Motion to Quash Service of Summons.

2. That in the City and State of New York, during September, 1955, there were discussions by and between representatives of Liebmann Breweries, Inc. and representatives of United Productions of America for the production of television spot commercials for the use of Liebmann Breweries, Inc. in the New York Television Signal Area; that such discussions continued during the months of October and November of 1955, and drafts of

the proposed contracts were prepared. That attached hereto as Exhibits 1 and 2 hereto and incorporated by reference herein are drafts of the said proposed contracts. At one time in November of 1955, Liebmann Breweries, Inc. sought United Productions of America to agree to produce television spot commercials for Liebmann Breweries, Inc. for the sale of its products in an Eastern territory, which included the metropolitan New York area, New Jersey, the eastern half of Pennsylvania, and the New England Television Signal Area.

3. At the same time, Rheingold Brewing Company, a California corporation, and a separate corporation from Liebmann Breweries, Inc. was negotiating for the production by United Productions of America of television spot commercials to be used in the California area.

4. The original drafts of the proposed agreements included both corporations, and contained proposed terms allowing the distribution of the commercials for Rheingold in the California area, and for Liebmann Breweries, Inc. in the Eastern territory.

5. Subsequently, upon the execution of the written agreement by and between UPA Enterprises Inc., Columbia Pictures Corporation, UPA Pictures Inc., and Foote, Cone & Belding, Inc., the advertising agency for Rheingold Brewing Company, the permissible territory for distribution of the commercials was limited to the State of California, including the California Television Signal Area. All references to distribution for use of the commercials in the Eastern area was eliminated from the final draft of the Agreement which was executed. Through an inadvertence the name of Liebmann Breweries, Inc. was not omitted from the introductory clause of the letter agreements.

6. Subsequently, early in June, 1956, further discussions and negotiations were undertaken by representatives of Liebmann Breweries, Inc. and representatives of United Productions of America for the right to use television films of Mr. Magoo for commercial purposes in the New York area to advertise the products of Liebmann Breweries, Inc. Attached hereto as Exhibits 3, 4, and 5, and incorporated by reference herein as though set forth in full hereat are drafts of said proposed agreements. The said proposed agreements were never executed. However, when Exhibit B to the amended Complaint herein was executed and limited to the area of California, including the City of Yuma, Arizona, through an inadvertence the name Liebmann Breweries, Inc. was not omitted from the said Exhibit B to the said amended Complaint.

7. Liebmann Breweries, Inc. did not, nor did any person, firm or corporation on its behalf, enter into any contract, nor did it execute or deliver any contract with the Plaintiffs in this case in any manner whatsoever for any purposes whatsoever.

8. The said Liebmann Breweries, Inc. has not at any time from 1953 to the present date, and does not now, manufacture or sell beer or any products whatsoever, either in the State of California or in the State of Arizona. Liebmann Breweries, Inc. has not at any time from 1953 to the present date, and does not now, advertise the sale of, nor solicit the purchase of any products whatsoever, either in the State of California or in the State of Arizona. Liebmann Breweries, Inc. has not at any time from 1953 to the present date, and does not now, have any agent for the manufacture or sale or solicitation for sale of any products whatsoever in the State of California or in the State of Arizona. By

reason of the foregoing, Liebmann Breweries, Inc. has had no reason, from 1953 to the present, and does not now have any reason for the licensing of commercial advertising cartoon characters or the production of commercial television films to advertise the sale of any products in the State of California or in the State of Arizona.

9. By reason of the foregoing, the agreements for the production of television commercial films and the licensing of the fanciful cartoon characters for use and distribution in the State of California, and Yuma, Arizona (Exhibits A, A-1, B and C to the Amended Complaint in this case) could not be meant to apply to Liebmann Breweries, Inc.

10. Liebmann Breweries, Inc. does not do business in California and has never done business in California. At no time from 1953 to the present, nor does it now, pay taxes in California. At no time from 1953 to the present, nor does it now have a license to manufacture or sell or import beer or any alcoholic beverage in or into the State of California.

11. Rheingold Brewing Company, a separate Defendant in this action, is and at all times has been a separate corporate entity from Liebmann Breweries, Inc. Rheingold Brewing Company was originally incorporated in the State of California on June 2, 1933, under the name of Rex Brewing Company. Thereafter, on July 23, 1933, its name was changed to California Brewing Association of Southern California. Subsequently, on March 29, 1935, its name was changed to Acme Brewing Co. On March 9, 1954, the corporate name was changed to Rheingold Brewing Company, Los Angeles, Subsidiary of Liebmann Breweries, Inc., N.Y. Prior to that time the corporation had prominently carried on in the State of California

the business of manufacturing, distributing and selling beer. In 1954 corporations owning substantially all of the stock of what was then Acme Brewing Co. sold their stock. The result of the sale was that a majority of the stock of the corporations owning stock in Acme Brewing Co. was held by Continental Holding Corporation, a California corporation, the stock of which in turn was owned Five-Sixths (5/6) by Liebmann Breweries, Inc., a New York corporation, and One-Sixth (1/6) by Bohemian Distributing Company, a California corporation. The shareholders of Bohemian Distributing Company do not own any shares of Liebmann Breweries, Inc.; nor do any of the shareholders of Liebmann Breweries, Inc. own any of the shares of Bohemian Distributing Company.

12. The existence of Rheingold Brewing Company under its former corporate names antedates by Eleven (11) years the purchase by Liebmann Breweries, Inc., of any interest in any corporation which owned stock in corporations owning stock in Rheingold Brewing Company. Rheingold Brewing Company was not, therefore, created, nor does it exist, nor has it ever existed as a means or device for Liebmann Breweries, Inc. to do business in the State of California. It was and is a separate corporation.

13. Rheingold Brewing Company was and is a separate corporation from Liebmann Breweries, Inc. and had and has its own shareholders, its own officers and its own directors. It had and has its own corporate officers, maintains its own bank accounts and its own books and records. The sales and purchases of its products and properties were and are carried on by it and its own employees. It has conducted and does conduct its business

in all respects separately and apart from Liebmann Breweries, Inc; Liebmann Breweries, Inc does not nor did it sell any of its own products or any of the products of Rheingold Brewing Company in California or Arizona, nor does it nor did it carry on any of the corporation or business activities of or for Rheingold Brewing Co.

14. Liebmann Breweries, Inc. has never entered into any agreements with either UPA Pictures Inc. or UPA Enterprises or United Productions of America or Columbia Pictures Corporation for distribution of television commercials in the State of California, or for the use or licensing of any cartoon characters in the State of California. Neither Liebmann Breweries, Inc. nor Foote, Cone & Belding, Inc., on behalf of Liebmann Breweries, Inc., entered into the written agreements attached as Exhibits A or A-1 or B or C to the Amended Complaint of the Plaintiffs in the above entitled action.

Wherefore, your affiant prays that the Motion of Liebmann Breweries, Inc. to quash service of Summons in the above entitled action be granted.

/s/ Walter H. Liebman
Walter H. Liebman

Subscribed and sworn to before
me this 16 day of March, 1959

/s/ Frances McNally
Notary Public in and for
said County and State

EXHIBIT 1

UPA Pictures, Inc.
4440 Lakeside Drive
Burbank, California

Gentlemen:

Your signature in the space below will confirm the following agreement made between us, on behalf of our client, Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called "Client"), and you this date:

A. You have commenced and are proceeding diligently to make presentations of rough storyboards built around the character "Mr. Magoo" of 60 seconds each in length. When preliminarily approved by us you will prepare 4 complete finished storyboards of 60 seconds each in length which will be presented to Client in New York City. We shall have a period of 48 hours (exclusive of Saturdays, Sundays and holidays) after the delivery of the storyboards to Client in New York City within which to notify you whether or not we desire to proceed with the production of television spots (herein called "spots") upon all of the terms and conditions hereinafter set forth. If we do not advise you of our desire to proceed with the production of spots, as herein provided, the term of this agreement shall terminate 48 hours after delivery of the storyboards to Client; we shall have no further right, title, claim or interest in the storyboards or the material thereof; and we shall pay you the sum of $10,000.00 for your services in connection with the storyboards.

B. If we notify you within 48 hours (exclusive of Saturdays, Sundays and holidays) after delivery of the storyboards to Client in New York City that we desire to

produce spots, the following terms and conditions shall apply:

1. The term of this agreement shall commence January 1, 1956 and shall continue for a term which shall run concurrently with the term of an agreement between you, Columbia Pictures Corporation and us with respect to the rights in the character "Mr. Magoo" being entered into concurrently herewith (herein called the "license agreement").

2. You agree to produce and furnish spots as ordered by us, but subject to the provisions hereinafter set forth, and deliver the same and all rights herein provided for to us at a price of $182.35 per filmed foot with respect to 60 second spots, and $205.88 per filmed foot with respect to 20 second spots, plus 117.65% of the cost of music, if any, for the spots. The price as aforesaid includes our agency commission of 15%, which agency commission you authorize us to deduct and withhold from our payment to you. The price herein specified shall be payable in installments as specified: 25% upon order of storyboards; 25% upon approval of completed storyboards; 25% upon approval of animation; 25% upon delivery of required prints. The price hereinabove specified shall be subject to increase to the extent that your cost for the spots is increased by reason of industry-wide increases in any union scale as a result of a collective bargaining agreement, or increases in federal, state, old age, unemployment or disability, insurance, taxes or contributions, or increases in contributions or payments required by a labor union or guild for union health, welfare or similar funds, over the amounts presently required to be paid for any of the foregoing, plus our 15% agency commission which you authorize us to deduct and withhold from our payment to you.

The foregoing price shall include: your supplying all persons and material necessary for the production of the spots, including the voice of Jim Backus as "Mr. Magoo"; all session and unit payments required under the 1955 Producers-Screen Actors Guild Codified Basic Agreement for Filmed Commercials (herein called "SAG agreement") and any other applicable union agreement; storyboard services, creative, photography and recording work and production items; copyright and music clearances; city and state sales taxes; negative (picture and sound) photographed in 35 mm, black and white, of highest technical quality in all respects, complete in all details, in first class condition, and all cuts and trims; and delivery of one 16 mm and one 35 mm release prints in black and white, in first class condition (herein called "the required prints"). If we desire these spots to be filmed in color and the required prints to be color prints, you will deliver the same at an increase in price of 20% over the price hereinabove specified.

We will pay all use fees required under the SAG agreement at scale.

3. If we use any of the storyboards delivered under paragraph A. hereof in the production of spots, no charge will be made for the storyboards.

4. During the first year of the term, we agree to order an aggregate of 8 minutes of spots. During the second year of the term, and similarly, during the third year of the term (if the term continues during such periods), we agree to order an aggregate of 6 minutes of spots.

The spots will be delivered by you not later than 10 weeks after we have approved the storyboard therefor. We agree to give you at least 12 weeks notice with re-

spect to the first air date for each spot. You acknowledge that we have advised you that the first air date for the spots will be January 15, 1956.

5. You will, so long as we permit you to retain possession of the negatives of the spots, store the same in a fireproof vault at your expense, and strike off as many prints thereof as we request in writing from time to time and ship such prints in accordance with our instructions at a cost to us which will not exceed per 16/mm:..... per 35/mm..... (including 15% thereof as agency commission payable from you to us which you authorize us to withhold and pay to ourselves) in addition to your reasonable out-of-pocket, direct costs in connection with such shipping, which costs must be billed to us by you in quadruplicate, accompanied by ways bills.

6. You will consult with our representative during, and permit him to supervise, photography of the spots, which representative may make suggestions solely as to the results to be accomplished and you will accept such suggestions. In no event will you proceed with principal photography of the spots until all basic production conditions have been approved by us. The work prints and final prints shall be exhibited to us and be subject to our written approval. No change in the script of the spots will be made by you unless expressly requested by us in writing, and when so requested will be made by you without an increase of price unless you notify us in writing within 48 hours (Saturdays, Sundays and holidays excluded) of the amount of any such increase after our delivery to you of such request. If we do not approve such increase in writing by notice to you within 48 hours (Saturdays, Sundays and holidays excluded) after your

written notice, our request shall be deemed withdrawn. The provisions of the next preceding sentence may not be waived by us and we will not be stopped, regardless of our conduct and that of the Client, from asserting the same if we or the Client orally request changes in the script or spots.

You will, prior to commencement of production of the spots, secure and maintain at all times during such production, at your expense, adequate public liability insurance covering injury to persons or damage to property arising out of such production, with us and the Client being covered as insureds.

You will, from commencement of production of the spots and thereafter so long as the negatives remain in your possession, keep the same fully insured against fire, theft and other loss customarily included in extended insurance coverage, at your expense, including us and the Client as insureds. You will deliver a certificate of such insurance and that referred to in the preceding paragraph to us prior to commencement of photography of the spots.

7. You represent and warrant that:

(a) Subject to the provisions of the license agreement, you are qualified to perform as required hereunder, there are no agreements preventing you from fulfilling this agreement and the spots and the material therein or otherwise supplied by you hereunder will not infringe upon or violate the legal rights of others and particularly will not violate or infringe any trade-marks, copyright, right of privacy of, or libel or slander, any party or be subject to any claim of lien or unpaid compensation, or be subject to any other matter or thing whatsoever which will in any

way interfere with or diminish the use by, or the value to, us or the Client, of the spots, or the material supplied by you hereunder or the ownership thereof. Subject further to the provisions of the license agreement, we shall during the terms have the full and exclusive rights to exhibit and transmit the film by means of television broadcasting in the California and Eastern television signal areas (including for this purpose, as to radio and television, Metropolitan New York area, New Jersey, the Eastern half of Pennsylvania and New England signal areas). All rights to the use of the films the sound track, the drawings and characters created by you and depicted in the film may be used by us during the term in radio and space media (including, but not limited to, magazines, newspages in daily or Sunday papers and comic printed publications, other than comic strips which are specifically excluded herefrom. For purposes of clarification the words comic strips shall not be deemed to include cartoons confined to paid advertising space exclusive of comic pages in daily or Sunday papers and comic books.) The foregoing, however, is subject to your approval of the use of the "Mr. Magoo" character which you agree not to withhold unreasonably.

Subject to your ownership of "Mr. Magoo" and to our rights to use the same only in accordance with the provisions of the license agreement, we will be the sole, exclusive and unlimited owner of the spots (including all negatives and prints thereof, and the original and conformed sound

tracks), and all material therein, including the original storyboards and all material supplied by you hereunder (whether or not incorporated in the spots), and of all rights in connection therewith, including, but not limited to, the right to copyright the spots and the material.

(b) The spots will be clear and free of all claims and encumbrances of any kind whatsoever, will contain such union seals, labels and clearances required for exhibition or telecasting of the films by us to the public, and be produced by you in compliance with all rules and regulations of unions having competent jurisdiction over persons rendering services in connection with production of the spots.

(c) All reports, contributions, payments and taxes to be made and paid with respect to the persons, materials or facilities furnished by you in connection with the spots, including, but not limited to, income taxes, withholding taxes, social security, unemployment insurance, old age pensions, workmen's compensation legislation or other and similar legislation, whether now in force and effect or hereafter enacted, will be made by you, and you will observe all requirements imposed by law upon employers. All contracts entered into by you hereunder, whether contracts of employment or otherwise, will be entered into by you as principal and you will not be deemed to be acting as our or the Client's agent in negotiating or entering into such contracts.

(d) You will procure from the players the standard form written contract required by the SAG

agreement completely filled out and containing a specific provision that compensation in excess of the minimum amounts provided for in the SAG agreement paid to a player for his services in making the spots or for any use or period of use thereof may be credited by you or us or the Client against any re-use fees payable to such player. You will deliver to us concurrently with the delivery of the required prints a copy of each such contract, together with (i) schedule showing the gross amount paid by you to such player for his services in making the spots and the portion in excess of the minimum amounts provided for in the SAG agreement, and (ii) two completely filled in and signed W-4 forms for the player (on which the marital status of each player is indicated).

You represent and warrant that with respect to the use of the voice of Jim Backus as "Mr. Magoo":

(i) You have the right to, and do hereby grant to us the right to, use the name, voice and likeness of Jim Backus as "Mr. Magoo" to advertise and promote the products of Client;

(ii) Your contract with Jim Backus contains a standard "morals" clause, and you will invoke the same in the event we notify you that in our opinion Mr. Backus has violated the provisions thereof; and

(iii) In the event of the death or disability of Jim Backus, you will supply a suitable substitute, subject to our reasonable approval, as the voice of "Mr. Magoo," and we will acquire with

respect to such substitute all of the rights herein granted with respect to Jim Backus.

The foregoing warranties shall not be deemed to apply to material supplied by us or the Client, nor to any claim for compensation of persons supplied by us or the Client.

You agree to indemnify and hold us and the Client, and our and their directors, officers, employees and other persons connected with the spots, and all television networks and the individual stations over the facilities of which the spots are broadcast, free and harmless of and from any and all liabilities from claims, demands, and actions, including attorneys' fees incurred based upon any violation or alleged violation of the foregoing representations and warranties or arising out of the production, television broadcast or other use of the spots under this agreement.

8. You are producing the spots as an independent contractor and not as our or the Client's agent or employee. Notwithstanding anything to the contrary hereunder, neither we nor the Client will have any right to control or direct the details, means, manner or method of performance of your obligation hereunder; and in particular, any use of the character "Mr. Magoo" shall be subject to your approval. No waiver by us of any breach of this agreement shall be deemed to be a waiver of any other provision of this agreement. Neither we nor the Client is obligated to use the spots; our, and the Client's only obligation being to pay the price as and when required hereunder.

We may assign our rights hereunder, or any part thereof, to any reputable person, firm or corporation who may be designated by Client as its agents in our place and stead. This agreement shall be construed as an agreement executed and to be performed in the State of California.

9. Any notice which we may desire to give you under this agreement shall be deemed given when personally served upon one of your officers or when deposited in a receptacle provided for under the postal laws of the United States, postage prepaid, addressed to you at the address which appears first above.

Very truly yours,

FOOTE, CONE & BELDING, INC.

By .....

APPROVED AND ACCEPTED:

UPA PICTURES, INC.

By .....

EXHIBIT 2

November 1, 1955

UPA Pictures, Inc.
and Columbia Pictures Corporation,
Los Angeles, California

Gentlemen:

Your signature in the space below will confirm the following agreement made between us, on behalf of our client, Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called "Client"), and you this date:

A. You represent and warrant that you are the sole owners of all rights in and to the name, character, characterization, voice, likeness and other elements of "Mr. Magoo" (all of which are herein collectively called "Mr. Magoo"), that you have the right to grant to us the rights herein set forth, and that you have not heretofore entered into and will not hereafter enter into any agreements which would impair or interfere with or diminish the value to us of the rights herein granted.

B. For $5.00 to you in hand paid, and other good and valuable consideration, receipt whereof is hereby acknowledged, you hereby grant to us an option to enter into an agreement with you upon all of the terms and conditions hereinafter set forth. The option herein granted may be exercised by us at any time, but not later than 48 hours (exclusive of Saturdays, Sundays and holidays) after the delivery to Client in New York City of the storyboards referred to in paragraph A. of the agreement between us and UPA Pictures, Inc. entered into concurrently herewith (herein called "production agreement"), by notice in writing to you. If we do not exercise the option herein granted to us, this agreement shall be of no further force and effect.

C. If we exercise the option, as hereinabove provided, the following terms and conditions shall apply:

1. You grant to us the exclusive right and license during the term hereof, and for a period of 30 days thereafter with respect to material authorized or released during the term, to use "Mr. Magoo" for the purpose of advertising, publicizing and promoting Client, its products and services, in the territory hereinafter specified, over television, radio and space media (including, but not limited to, magazines, newspapers, point of sale exhibits, billboards and all printed publications, other than comic strips which are specifically excluded herefrom. For purposes of clarification the words comic strips shall not be deemed to include cartoons confined to paid advertising space exclusive of comic pages in daily or Sunday papers and comic books.) The territory covered by this agreement shall be the State of California (including for this purpose, as to radio and television, the California signal area, even though reception may incidentally be had outside the State of California, and as to space media, uses made or distributed in California, and also, magazines, newspapers and similar publications published in California, even though there may be occasional distribution of such publications in other areas), and if we exercise the right granted to us under paragraph 3(b), the Eastern territory (including for this purpose, as to radio and television, Metropolitan New York area, New Jersey, the Eastern half of Pennsylvania and New England signal areas, even though reception may incidentally be had outside such areas, and as to space media, uses made or distributed in such areas, and also, magazines, newspapers and similar publications published in such areas, even though there may be occasional distribution of such publications in other areas).

2. The term hereof (herein referred to as "the term" and sometimes as "the original term") shall commence on January 1, 1956 and shall continue for a period of 5 years thereafter, subject to termination by us at the expiration of any year of the term by not less than 30 days advance notice in writing to you; provided, however, that if we terminate the term hereof at the expiration of the first year of the term or of the second year of the term as the case may be, in addition to the payments specified in paragraph 3 hereof, we will pay you concurrently with such termination the following:

(a) If we terminate at the expiration of the first year of the term, $22,000.00 or

(b) If we terminate at the expiration of the second year of the term, $24,000.00.

In the event of termination as herein provided, we shall have no further obligation to you with respect to any payment for any year of the term subsequent to such termination.

3. For the rights granted to us hereunder, we agree to pay to you the following amounts with respect to each year of the term as to which we have not exercised our right of termination hereinabove provided:

(a) With respect to the California territory, the sum of $18,000.00 during each year of the term.

(b) With respect to the Eastern territory, provided, however, that we shall only have the rights herein granted with respect to the Eastern territory and shall only be obligated to make the payments herein provided, if we notify you within 60 days after the exercise of the option specified in paragraph 1 hereof that we desire to have the Eastern territory included within the scope of this agreement:

For each year of the term.....$10,000.00

All amounts specified herein shall be paid to you within 30 days after the commencement of each respective year of the term. Payment shall be made jointly, and we shall have no obligation to see to the application of the proceeds as between you.

4. The rights granted to us shall be exclusive with respect to beverages competitive to products of Client, including beer, beer products and soft drinks, during the first year of the term in the United States of America, and during the balance of the term in the territory above specified, and you agree not to authorize or permit use of "Mr. Magoo" contrary to the exclusivity provisions herein set forth. You further agree not to authorize or permit the use of "Mr. Magoo" in entertainment films of a character detrimental to the products, name or advertising of Client. (For example, you will not authorize or permit "Mr. Magoo" to appear as a proponent of the WTCU, or to be portrayed so as to lead the public to believe that he has been drinking immoderately, or as belittling the "Miss Rheingold Contest," or otherwise causing ridicule or embarrassment to Client.) It is specifically agreed, however, that except as aforesaid, all rights not herein exclusively granted to us are reserved by you and may be exercised freely by you and shall be deemed non-competitive to the rights herein granted.

5. We agree to give credit to UPA Pictures, Inc. and to Columbia Pictures Corporation on all printed material, other than point of sale material, in size of type at least 5% of the size of the credit to "Mr. Magoo," which credit shall read substantially, as follows:

> "See Mr. Magoo at your favorite theatre, Columbia Pictures Corporation-UPA Pictures, Inc. release."

We shall not, however, be responsible for any casual or inadvertent failure to accord you the credit hereinabove specified, or any failure due to acts of third persons beyond our control, but we shall endeavor to correct the same when notified thereof in writing. In connection with television uses of Mr. Magoo, credit shall be given to you on the film, but the same need not necessarily be exhibited on the television screen.

6. We ackowledge that it is of basic importance to you to maintain "Mr. Magoo" as a unique character of distinctive nature and appeal, and we therefore agree that all art work with respect to "Mr. Magoo" shall be subject to your approval and shall be done by your artists, for which we shall reimburse you at your standard cost for new art work, provided only that where feasible we may, subject to your approval, use art work taken directly from television films made by you pursuant to the production agreement.

7. You further agree that if, during the term, you shall decide to license the use of "Mr. Magoo" for the purpose of advertising, publicizing and promoting beer or beer products or beverages competitive thereto in the State of Illinois, you will give us the first opportunity to acquire such license at a price equal to the price of the best bona fide offer which you may determine to accept. Before accepting any such offer, you will give us written notice thereof and of all of the terms thereof and we shall have the exclusive option for a period of 10 days (excluding Saturdays, Sundays and holidays) after receipt of said notice within which to enter into an agreement with you for the license of such rights in "Mr. Magoo" at the price of said offer by giving you written notice of exercise of said option at any time prior to the expiration of

said 10-day period. If for any reason we should not exercise said option but thereafter the offer which you communicated to us should not actually be accepted by you, and such license is not actually granted to another within 60 days after our option shall have expired, then in each such instance, our said option shall revive and we shall again have the right of first refusal with respect to the State of Illinois as herein provided.

8. We shall have the further option to extend the term of his agreement for an additional period of 10 years from and after the expiration of the original term (herein called "the extended term") upon the following terms and conditions:

(a) We shall have all of the rights and licenses specified in paragraphs 1 and 4, and shall comply with the obligations specified in paragraphs 5 and 6 during the extended term.

(b) In lieu of the provisions of paragraph 3, we shall pay you during the extended term, the following:

(i) With respect to the California territory, the sum of $10,000.00 during each year of the extended term.

(ii) With respect to the Eastern territory, provided that we exercise the option for the extended term with respect to such Eastern territory (it being agreed that we may not exercise such option with respect to the Eastern territory if we have not exercised the same option during the original term and that we are not obligated to exercise the option hereunder with respect to the Eastern territory even though we have theretofore exercised such option during the original term) the sum of $10,000.00 for each year of the extended term.

All amounts specified herein shall be paid to you within 30 days after the commencement of each respective year of the extended term. Payment shall be made jointly and we shall have no obligation to see to the application of the proceeds as between you.

(c) The extended term is subject to termination by us at the expiration of any year thereof by not less than 30 days advance notice in writing to you, in which event we shall have no further obligation to you with respect to subsequent years of the extended term.

The option herein granted may be exercised by us by notice in writing to you at any time but not later than 30 days prior to the expiration of the original term.

Very truly yours,

FOOTE, CONE & BELDING, INC.

By .....

APPROVED AND ACCEPTED:

UPA PICTURES, INC,

By .....

COLUMBIA PICTURES CORPORATION

By .....

EXHIBIT 3

....., 1956

UPA Enterprises
and Columbia Pictures Corporation
Los Angeles, California

Gentlemen:

Reference is hereby made to that certain agreement, as amended, entered into betwen you and us on November 30, 1955, hereinafter referred to as the "Licensing Agreement," whereby you granted to us on behalf of our Client, Rheingold Brewing Company and/or Liebmann Breweries, Inc., certain rights in and to your cartoon character "Mister Magoo." You and we now desire to enter into an agreement respecting the use of "Mister Magoo" on beer bottle neck labels or neck wraps and in connection with markings on beer can tops and/or bottoms, and do agree as follows:

1. You hereby grant to us the exclusive right and license to use the name and likeness of "Mister Magoo" in connection with neck labels or neck wraps on beer bottles and markings on beer can tops and/or bottoms.

2. The territory of this license shall be the State of California (including the City of Yuma, Arizona) only.

3. The term of this license shall commence on July 15, 1956 and shall continue for a period of time concurrently with the term of the Licensing Agreement and subject to all provisions of the Licensing Agreement relating to the term of extensions thereof.

4. For the rights granted to us hereunder we agree to pay to you the sum of Five Thousand ($5,000.00) Dollars per year during each year (and pro rata for the portion of the last year of the term prior to the expiration

thereof) of the term hereof. It is understood and agreed, however, that in the event you exercise your rights to extend the term of the Licensing Agreement for a third year, and we elect to pay the sum stipulated in paragraph 2 of the Licensing Agreement to terminate the Licensing Agreement, then and in that event, the term of this agreement shall be deemed terminated without further obligation on our part for the rights granted herein as respects said third year.

5. All artwork required in connection with the exercise of rights granted herein shall be done for us by UPA Pictures, Inc. at their standard studio rate for artwork. It is understood that the charges for designing neck labels or neck wraps on beer bottles and markings on beer can tops and/or bottoms, and preparation of finished artwork for same will not exceed $500.00.

6. We shall have the right, at our election, to extend the territory of this license to include the New York Area (deemed to include the State of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, and Pennsylvania), subject to the following:

(a) If we so elect to extend the territory hereof, we shall give you written notice to that effect within ninety (90) days from date hereof.

(b) If we exercise the option hereunder, the term of this agreement with respect to the New York Area shall run concurrently with the amendment to the Licensing Agreement dated ..... 1956, and the provision specified in the second sentence of paragraph 4 shall apply.

(c) Upon the exercise of our option herein we shall pay you, as additional compensation hereunder,

the sum of Five Thousand ($5,000.00) Dollars as respects the first year's use of "Mister Magoo", pursuant to the terms hereof, and we shall make additional payments of Five Thousand ($5,000.00) Dollars for each additional year (and pro rata for the portion of the last year of the term prior to the expiration thereof) during the term hereof, subject to the provisions of paragraph 4 hereinabove.

7. All terms and conditions of the Licensing Agreement not inconsistent with the terms herein set forth, including, but not by way of limitation, the provisions relating to copyright notices, are deemed a part hereof as though fully set forth herein.

Your signatures, together with ours, hereinbelow, will constitute this a binding and enforceable agreement between us.

Very truly yours,

FOOTE, CONE & BELDING, INC.

By .....

ACKNOWLEDGED:

UPA PICTURES, INC.

By .....

ACCEPTED AND AGREED TO:

UPA ENTERPRISES

By .....

President

COLUMBIA PICTURES CORPORATION

By .....

EXHIBIT 4

....., 1956.

UPA Enterprises
and Columbia Pictures Corporation
Los Angeles, California

Gentlemen:

Reference is made to that certain agreement, as amended, entered into between you and us on November 30, 1955, hereinafter referred to as the "Licensing Agreement," whereby you granted to us on behalf of our Client, Rheingold Brewing Company and/or Liebmann Breweries, Inc., certain rights in and to your cartoon character "Mister Magoo." You and we now desire to enter into a further agreement as respects the matters set forth in the aforementioned agreements, and do agree as follows:

1. You grant to us, on the same terms and conditions as set forth in the Licensing Agreement, the exclusive right and license to use "Mister Magoo" in the following additional territory, hereinafter referred to as the "New York Area": The States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, and Pennsylvania.

2. The term of this license shall commence on the day of the first television broadcast in the New York Area of a "Mister Magoo" filmed commercial but no later than October 15, 1956, and shall continue for a period of time equal in length to the term of the Licensing Agreement and subject to all terms and provisions therein contained relating to the term and extensions thereof.

3. For the rights granted to us herein we agree to make payments to you, in addition to those set forth in the Licensing Agreement, of the sums equal to the

amounts set forth in paragraph 3 of the Licensing Agreement and on the same terms and conditions.

4. The Licensing Agreement is hereby amended to provide that the television rights in respect of "Mister Magoo," as set forth in paragraph 1 thereof, shall include not only the use of 60-second commercials but also the use of 20-second commercials.

5. Paragraph 1 of the Licensing Agreement relating to the territory thereof is hereby amended to incorporate the City of Yuma, Arizona, within the territory. No other term or condition of the Licensing Agreement shall be deemed amended or modified by this paragraph.

6. It is understood and agreed that, in addition to the rights to use "Mister Magoo" now or theretofore granted to us, we shall have the right to use "Mister Magoo" in radio broadcasting (other than in "network" broadcasting as the term is commonly understood in the industry), subject to the following:

(a) The right granted herein is limited to the use of "Mister Magoo" in commercial announcements, none of which shall exceed sixty (60) seconds in length.

(b) Any text material which we propose to use in connection with such commercial announcements shall be subject to the prior approval of UPA Pictures, Inc.

(c) We will contract directly with voice actors to be used in connection with the commerial announcements. However, we will not enter into a contract with any voice actor depicting the voice of "Mister Magoo" without UPA Pictures, Inc. approval of

such actor first had and obtained. This approval, once granted, may be withdrawn at any time if UPA Pictures, Inc. feels the characterization of "Mister Magoo" by such actor might be detrimental to their use of "Mister Magoo."

(d) For the rights granted herein we shall pay you the following:

(i). Five Thousand ($5,000.00) Dollars per year for the rights granted herein as respects the exercise thereof in the New York Area, for a term to be concurrent with this agreement.

(ii) Five Thousand ($5,000.00) Dollars per year (or pro rata for the portion of the last year of the term prior to the expiration thereof) for the rights granted herein as respects the exercise thereof in the State of California (including the City of Yuma, Arizona) for a term to begin on July 15, 1956 and to continue until the termination of the Licensing Agreement.

In the event you exercise your right to extend the term of the Licensing Agreement for a third year, and we elect to pay the sum stipulated in paragraph 2 of the Licensing Agreement to terminate the Licensing Agreement with respect to either the New York Area or California, as the case may be, then, and in that event, the term of this agreement as respects the rights granted herein, shall be deemed terminated without further obligation on our part as respects said third year.

7. All terms and conditions of the Licensing Agreement not inconsistent with the foregoing, including, but not by way of limitation, the provisions relating to copy-

right notice, are deemed incorporated herein and made a part hereof.

Your signatures, together with ours hereinbelow, will constitute this a binding and enforceable agreement between us.

Very truly yours,

FOOTE, CONE & BELDING, INC.

By .....

ACCEPTED AND AGREED TO:

UPA ENTERPRISES

By .....

President

COLUMBIA PICTURES CORPORATION

By .....

ACKNOWLEDGED:

UPA PICTURES, INC.

By .....

President

EXHIBIT 5

....., 1956

UPA Pictures, Inc.
4440 Lakeside Drive
Burbank, California

Gentlemen:

Reference is made to an agreement, as amended, dated November 30, 1955, between you and us, hereinafter referred to as the "Production Agreement," relating to the production of filmed television commercials, hereinafter referred to as "the commercials." You and we now desire to enter into a further agreement as respects the matters set forth in the aforementioned agreement, and do agree as follows:

1. All terms and conditions of the Production Agreement not inconsistent with the provisions hereinbelow shall be deemed incorporated herein and made a part hereof as respects the production of commercials for use in the New York Area (the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, and Pennsylvania).

(a) Without limiting the generality of the foregoing, it is understood and agreed that we shall order at least the number of commercials stipulated in paragraph 4 of the Production Agreement for use in the New York Area, over and above our orders required of us under the terms of the Production Agreement.

(b) It is further understood and agreed that we shall have the right to use commercials made for use in California (including the City of Yuma, Arizona;

in the New York Area and *vice versa*. Any adaptation of commercials in this connection will be done by UPA Pictures, Inc. at their standard studio rate (including overhead). Orders for such work shall not be deemed an "order" within the provisions of paragraph 4 of the Production Agreement.

(c) The term of the Production Agreement, as respects the New York Area, shall be deemed to run concurrently with the term of the agreement executed concurrently herewith between UPA Enterprises, Columbia Pictures Corporation and ourselves.

(d) It is understood and agreed that the answer print of the first commercial to be produced pursuant to this agreement shall be delivered to us no later than October 15, 1956.

2. The second paragraph of subparagraph (a) of paragraph 7 of the Production Agreement is hereby amended by addition of the following language: ". . . . Upon the expiration of the term hereof or as the same may be extended, all rights in and to the commercials and related advertising material shall revert to you as sole owner thereof, and we shall, within 60 days after the expiration of the term return all the physical properties produced by virtue of our license (including the positive prints and negatives of the commercials, advertising material, and the like) to you, or, if you so elect, we shall destroy the same and provide you with our certification of such destruction.

3. Pursuant to an agreement executed concurrently herewith between UPA Enterprises, Columbia Pictures

Corporation and ourselves, we have been granted the right to make and use 20-second filmed commercials. It is understood and agreed as between us that if we order any 20-second filmed commercials, production of said 20-second filmed commercials shall be credited against our minimum guarantee under paragraph 4 of the Production Agreement upon a formula to be mutually agreed upon between the parties hereto.

Your signature, together with ours hereinbelow, will constitute this a binding and enforceable agreement between us.

Very truly yours,

FOOTE, CONE & BELDING, INC.

By .....

ACCEPTED AND AGREED TO:

UPA PICTURES, INC.

By .....

State of California, County of Los Angeles—ss.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 742 South Hill Street, Los Angeles, California. On the 27th day of March, 1959, I served the within Supplemental Affidavit of Walter H. Liebman in Support of Motion to Quash Service of Summons on the Plaintiffs in said action, by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Los Angeles, California addressed as follows:

Youngman, Hungate & Leopold
6505 Wilshire Boulevard
Los Angeles 48, California

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on March 27, 1959 at Los Angeles, California.

TERESA WEEKS.

*Both the verification and proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

Exhibit G.

Coyle and Cooper
742 South Hill Street
Los Angeles 14, California
MAdison 7-9077
Attorney for Defendants

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc., and Rheingold Brewing Company, Defendants. No. 698923.

DECLARATION OF FRANK E. DELANO IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS.

Comes now Frank E. Delano, and says:

1. That he is a Vice-President of Foote, Cone & Belding, Inc.

2. That in the City and State of New York, during September, 1955, there were discussions by and between representatives of Liebmann Breweries, Inc. and representatives of United Productions of America for the production of television spot commercials for the use of Liebmann Breweries, Inc. in the New York Television Signal Area; that such discussions continued during the months of October and November of 1955, and drafts of the proposed contracts were prepared. At one time in November of 1955, Liebmann Breweries, Inc. sought United Productions of America to agree to produce television spot commercials for Liebmann Breweries, Inc. for the sale of its products in an Eastern territory, which included the metropolitan New York area, New Jersey, the eastern

half of Pennsylvania, and the New England Television Signal Area.

3. At the same time, Rheingold Brewing Company, a California corporation, was negotiating for the production by United Productions of America of television spot commercials to be used in the California area.

4. Rheingold Brewing Co. is a California corporation. It is a separate corporate entity and different than Liebmann Breweries, Inc., which is a New York corporation. Liebmann Breweries, Inc. does not offer for sale or sell or advertise the sale of its beer or any of its products in the State of California.

5. The original drafts of the proposed agreements included the names of both corporations, and contained proposed terms allowing the distribution of the commercials for Rheingold in the California area, and for Liebmann Breweries, Inc. in the Eastern territory.

6. Subsequently, upon the execution of the written agreement by and between UPA Enterprises Inc., Columbia Pictures Corporation, UPA Pictures Inc., and Foote, Cone & Belding, Inc., as the advertising agency for Rheingold Brewing Company only, the permissable territory for distribution of the commercials was limited to the State of California, including the California Television Signal Area. All references to distribution for use of the commercals in the Eastern area was eliminated from the final draft of the Agreement which was executed. Through an inadvertance and mistake the name of Liebmann Breweries, Inc. was not omitted from the introductory clause of the letter agreements, although the agreements could have no bearing upon its business or the sale of its products since the agreements were limited to licenses and use and televising in the State of California.

7. The contracts entered into by Foote, Cone & Belding, Inc., copies of which are attached as Exhibits A, A-1, B and C to Plaintiffs Amended Complaint in the above entitled action, were entered into by Foote, Cone & Belding, Inc. for and on behalf of, and only for and on behalf of its client, Rheingold Brewing Company which sells its products in California.

8. By reason of the foregoing, the agreements for the distribution of television commercials and the licensing of the fanciful cartoon characters for use and distribution in the State of California did not and were not meant to apply to Liebmann Breweries, Inc.

9. Liebmann Breweries, Inc. has never entered into any agreements with either UPA Pictures Inc. of UPA Enterprises or United Productions of America or Columbia Pictures Corporation for distribution of television commercials in the State of California, or for the use or licensing of any cartoon characters in the State of California. Neither Leibmann Breweries, Inc. nor Foote, Cone & Belding, Inc., on behalf of Liebmann Breweries, Inc., entered into the written agreements attached as Exhibits A or A-1 or B or C to the Amended Complaint of the Plaintiffs in the above entitled action.

I certify under penalty of perjury that the foregoing is true and correct.

Executed January 21, 1959, at Los Angeles, California.

/s/ FRANK E. DELANO
Frank E. Delano

(PROOF OF SERVICE BY MAIL—1013a, 2015.5 C. C. P.)

State of California, County of Los Angeles—ss.

I am a citizen of the United States and a resident of the county aforesaid: I am over the age of eighteen years and not a party to the within entitled action; my business address is: 742 South Hill Street, Los Angeles, California. On the 27th day of March, 1959, I served the within Declaration of Frank E. Delano in Support of Motion to Quash Service of Summons on the Plaintiffs in said action, by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Los Angeles, California addressed as follows:

Youngman, Hungate & Leopold
6505 Wilshire Boulevard
Los Angeles 48, California

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on March 27, 1959 at Los Angeles, California.

TERESA WEEKS

*Both the verification and proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

In the District Court of Appeal, Second Appellate istrict, State of California.

Liebmann Breweries, Inc., a corporation, Petitioner, vs. ie Superior Court of the State of California, in and for ie County of Los Angeles, Respondent. UPA Pictures, ic., UPA Enterprises and Columbia Pictures Corpora- on, Real Parties in Interest. 2nd Civil No. 23830.

Certificate of State Court as to Existence of a Federal Question.

On Motion of the Petitioner, Liebmann Breweries, Inc., ppearing specially only, this Court, in addition to the)rders made herein, orders it to be certified and made part of the record in this case that in the Order deny ng Petition for Writ of Mandate made here on or about une 1, 1959, and in the Petition and in the Points nd Authorities in support thereof on behalf of the Peti- ioner, Liebmann Breweries, Inc., appearing spetially only, he said Petitioner insisted and relied upon the following ederal question:

Whether the assertion by the California courts of juris- iction over said Petitioner deprived said Petitioner of ue process of law contrary to the 14th Amendment to he United States Constitution where Petitioner is a for- ign corporation which has never done business in Cali- oria, which has no contacts with the State of Cali- ornia, which was being sued in the courts of California n a cause of action not arising in California, and the urported service on which was not made on any officer r agent of said Petitioner, but was made upon the Cali- ornia Secretary of State and a copy of the Summons and leadings was sent by registered mail to Petitioner in the tate of New York.

It became material to the determination of said case in this Court to decide said question so raised by the Petitioner, Liebmann Breweries, Inc., which question was determined adversely to the said Petitioner, Liebmann Breweries, Inc., as appears by the entry of a Minute Order denying the said Petitioner's Petition for Writ of Mandate.

It is further hereby certified that pursuant to the provisions of Sections 416.1, 416.2 and 416.3 of the Code of Civil Procedure of the State of California, and by reason of the Order of this Honorable Court in the above entitled matter denying the said Petitioner's Petition for Writ of Mandate to compel the Superior Court of the State of California in and for the County of Los Angeles to Quash Service of Summons upon said Petitioner without opinion and without Issuance of Alternative Writ or Order to Show Cause, and by the further denial without opinion by the Supreme Court of the State of California in said Case No. 23830 of a Petition for Hearing, the District Court of Appeal of the State of California, Second Appellate District, is the highest Court of Law in the State of California in which the final decision on the original proceedings brought by the Petition for Writ of Mandate could be had.

DATED: July 17, 1959

ORDERED BY THE COURT,

/s/ WHITE,
Presiding Justice.

In the District Court of Appeal, Second Appellate District, State of California.

Liebmann Breweries, Inc., a corporation, Petitioner, vs. the Superior Court of the State of California in and for the County of Los Angeles, Respondent. UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Real Parties in Interest. 2nd Civil No. 23830.

Order Denying a Stay of Proceedings.

On consideration of the Motion of Petitioner, Liebmann Breweries, Inc., for a Stay of Proceedings in the Superior Court of the State of California in and for the County of Los Angeles, being Case No. 698923, pending either the filing of a Notice of Appeal to the Supreme Court of the United States or a Petition to the Supreme Court of the United States for Writ of Certiorari, and considering that this Court in the above-entitled matter on June 1, 1959, denied Petitioner's Petition for Writ of Mandate without Opinion and without issuance of an Alternative Writ or Order to Show Cause, which became final as to this Court immediately after filing on June 1, 1959, it is now

ORDERED by this Court that the Motion to Stay Proceedings is denied on the ground that this Court has no jurisdiction to grant the Motion to Stay Proceedings.

DATED: July 17, 1959.

/s/ WHITE,
Presiding Justice.

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IN THE

Supreme Court of the United States

October Term, 1959.

No. 241

LIEBMANN BREWERIES, INC.,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES, UPA PICTURES, INC., UPA ENTERPRISES and COLUMBIA PICTURES CORPORATION,

Respondents.

Opposition of Respondents to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Statement.

1. Statement of Proceedings.

Respondents UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation (hereinafter for convenience herein collectively called "Respondents") filed an action for damages for breach of contract against defendants Foote, Cone & Belding, Inc., Liebmann Breweries, Inc. (hereinafter for convenience called "Petitioner") and Rheingold Brewing Company (hereinafter for convenience called "Rheingold") in the Superior Court of the State of California, in and for the County of Los Angeles. Process was served upon defendants Foote, Cone & Belding, Inc. and Rheingold in California. Petitioner is a New

York corporation, having its principal place of business in New York City, which has never qualified to do business in California. Rheingold's activities are limited to California and certain minor adjacent areas. For the purpose of obtaining evidence to establish that Petitioner is subject to the jurisdiction of the California courts, Respondents took the depositions of Byron Mayo, an employee of Foote, Cone & Belding, Inc., of Frank Delano, the Vice-President of Foote, Cone & Belding, Inc., and of Philip Liebmann, the President of Petitioner and of Rheingold.

Respondents served Petitioner by service upon the California Secretary of State. Petitioner filed its motion in the California Superior Court to quash such service of summons upon it, purporting to appear specially for that purpose, although also moving to strike portions of affidavits and depositions which the Respondents had offered in evidence. A hearing on said motion to quash was held and the Superior Court denied the motion.

Petitioner thereupon petitioned the District Court of Appeal of the State of California, Second Appellate District, for an alternative writ of mandate (*i.e.*, for an order to show cause why the writ should not be granted). Petitioner did not cause the record in the Superior Court to be transmitted to the District Court of Appeal for its consideration on Petitioner's application, but instead submitted to the District Court of Appeal only the evidence which Petitioner had presented to the Superior Court in support of its motion to quash service of summons (a device

adopted likewise by Petitioner before this Court). Petitioner failed to transmit to the District Court of Appeal any part of the evidence presented to the Superior Court by Respondents in opposition to Petitioner's motion to quash. Respondents did not oppose Petitioner's application for the alternative writ because they assumed that the District Court of Appeal would issue its order to show cause and that they would have an opportunity to oppose Petitioner's application at the hearing pursuant thereto. Respondent Superior Court, however, did file with the District Court of Appeal its points and authorities in opposition, pointing out that there was substantial evidence to support the order of the Superior Court denying Petitioner's motion to quash and quoting certain portions of the affidavit of Glenn Warner which had been filed in the Superior Court in opposition to said motion.[1] Hence, Petitioner's assertion that the allegations of fact contained in its petition to the District Court of Appeal of the State of California for an alternative writ of mandate must be accepted as true because unopposed is an assumption without foundation on the record. The District Court of Appeal denied Petitioner's application for an alternative writ summarily, without opinion and without Respondents ever having been heard by it. Petitioner thereupon petitioned the Supreme Court of the State of California for a hearing and that court denied its petition.

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[1]Respondents have, in accordance with Rule 21, Revised Rules of the Supreme Court of the United States, heretofore filed a certified copy of the brief of Respondent Superior Court to augment the record filed herein by Petitioner. That brief is reproduced in Appendix B, commencing at page 17.

2. Statement of Facts.

Petitioner has now petitioned this Court for a writ of certiorari to review the judgment of the California District Court of Appeal. That petition is based almost entirely on the representation to this Court that the Superior Court and the District Court of Appeal based their decisions refusing to quash service of summons upon Petitioner on the fact that Petitioner's only contact with the State of California was through its subsidiary Rheingold which was doing business in California. Petitioner's argument is directed to the proposition that a parent corporation which has no contact with the forum, apart from its relationship with a subsidiary which is doing business in the forum, is not subject to the jurisdiction of the courts of the forum. It is true that at all times herein Rheingold was a subsidiary of Petitioner, but such parent-subsidiary relationship was only incidental to the decision of the California courts that Petitioner was doing business in the State of California. The actual facts[2] upon which Respondent Superior Court relied and which Petitioner has withheld from this Court, as it attempted to withhold them from the California District Court of Appeal, were:

> that in November of 1955, Foote, Cone & Belding, Inc. entered into a contract with Respondents UPA

[2]Respondents have, in accordance with Rule 21, Revised Rules of the Supreme Court of the United States, heretofore filed a certified copy of each of the depositions of Philip Liebmann, President of Petitioner and Rheingold, Frank Delano, Vice-President of Foote, Cone & Belding, Inc., and Byron Mayo, an employee of Foote, Cone & Belding, Inc., together with the affidavit of Herbert D. Klynn, Vice-President of Respondent UPA Pictures, Inc., and the affidavit of Glenn Warner, counsel for Respondents, all of which were offered in evidence by Respondents at the hearing before the Superior Court and which were available to the District Court of Appeal for consideration in connection with Petitioner's application for an alternative writ of mandate. (*Cal. Rules on Appeal*, Rule 12(a).)

Enterprises and Columbia Pictures Corporation which, Foote, Cone & Belding, Inc. recited, was "on behalf of our client Rheingold Brewing company and/or Liebmann Breweries, Inc. (herein called 'Client')" and likewise entered into another agreement with Respondent UPA Pictures, Inc. "on behalf of our client Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called 'Client')" [Amended Complaint, Exs. "A," "C"];

that the first of said contracts provided for the licensing by UPA Enterprises and Columbia Pictures Corporation to such "Client" of the fanciful character "Mister Magoo" for the purpose of advertising Rheingold beer in California, and the second contract required UPA Pictures, Inc. to produce certain so-called "television spot commercials" featuring "Mister Magoo" for the advertising of Rheingold beer in California. It is provided in Paragraph B on the first page of the first such contract that Foote, Cone & Belding, Inc. was to have an option "after the delivery to Client in New York City of the storyboards . . ." [Amended Complaint, Ex. "A"] and in the second paragraph on the first page of the second such contract that storyboards had been heretofore prepared and delivered to "Client" in New York City . . ." [Amended Complaint, Ex. "C"];

that Foote, Cone & Belding, Inc. advised Herbert Klynn, the negotiating representative of Respondents in connection with such contracts, that it was negotiating with reference to the contracts referred to in the two immediately preceding paragraphs on behalf of its client Petitioner, the Respondents at all times believed that they were dealing with Petitioner as a

principal, and at no time were they advised to the contrary [Affidavit of Herbert Klynn, p. 1, par. 1; p. 5 par. 9; Deposition of Philip Liebmann, pp. 304, 305];

that Philip Liebmann came to California and participated in several meetings with representatives of Respondents looking to the formation of such contracts [Deposition of Philip Liebmann, p. 294; Affidavit of Herbert Klynn, pp. 2-4, pars. 4-6];

that during the negotiations relating to such contracts and while those contracts were being performed by Respondents, Philip Liebmann met with representatives of Respondents on several occasions in California, but never at the offices of Rheingold [Affidavit of Herbert Klynn, pp. 3, 4, par, 6];

that at the inception of negotiations relating to such contracts Philip Liebmann told representatives of Respondents, including Klynn, that it was necessary for him, Philip Liebmann, to present the idea of using the Magoo character for advertising Rheingold beer to Stockholders and members of the Board of Directors of Petitioner who lived in Europe [Deposition of Philip Liebmann, pp. 296, 297; Affidavit of Herbert Klynn, p. 2, par. 4; see also the Deposition of Byron Mayo, pp. 30, 31];

that during the course of such negotiations Philip Liebmann detailed Petitioner's history and background to Herbert Klynn [Deposition of Philip Liebmann, p. 296; Affidavit of Herbert Klynn, p. 3, par. 5];

that Frank Delano, the senior Vice-President of Foote, Cone & Belding, Inc., who executed such con-

tracts with Respondents, is the management representative of Foote, Cone & Belding, Inc. for Petitioner and is directly responsible for the supervision of all Petitioner advertising [Deposition of Frank Delano, pp. 5-7];

that Dr. Hermann Schuelein, the Chairman of the Board and chief executive officer of Petitioner in 1955 (at the time such contracts were executed), conferred with Respondents in California relating to the execution of such contracts and approved newspaper advertising for Rheingold beer in both California and New York [Deposition of Philip Liebmann, pp. 205, 287; Affidavit of Herbert Klynn, p. 3, par. 5; Deposition of Byron Mayo, p. 8; Deposition of Frank Delano, pp. 43, 44, Ex. 8];

that Byron Mayo met with William Mathews, an employee of Foote, Cone & Belding, Inc. and the senior account executive assigned by it to Petitioner's advertising account, on several occasions in California during the period from September, 1955, until May, 1956, but he never met with Mr. Mathews at the Los Angeles plant of defendant Rheingold [Deposition of Byron Mayo, p. 24];

that said William Mathews received copies of correspondence relating to the Mister Magoo commercials which were the subject of such contracts [Deposition of Byron Mayo, p. 20; Deposition of Frank Delano, Exs. 1, 11, 12, 13, 15, 16, 20 and 34];

that it was the practice of Foote, Cone & Belding, Inc. to inform Philip Liebmann in New York and to obtain his approval in New York of all developments in connection with advertising Rheingold beer through

the use of the Magoo character [Deposition of Byron Mayo, pp. 37, 38, 40, 42-44; Deposition of Frank Delano, pp. 58, 59; Deposition of Philip Liebmann, pp. 314-315];

that Philip Liebmann used the letterhead of Petitioner in addressing communications to the Respondents and to Foote, Cone & Belding, Inc. relating to such contracts [Deposition of Philip Liebmann, Exs. 28, 29, and 33];

that Philip Liebmann could not recall either the California telephone number or street address of Rheingold when his deposition was taken although he knew both the New York telephone number and street address of Petitioner [Deposition of Philip Liebmann, pp. 204, 216, 217, and 231];

that during the period from September, 1955, until May, 1956, Byron Mayo, who was the account executive assigned by Foote, Cone & Belding, Inc. to cooperate with UPA Pictures, Inc. in the making of such television spot commercials by UPA Pictures, Inc. met in California with Philip Liebmann on at least sixty (60) different occasions [Deposition of Byron Mayo, pp. 23, 24];

that the spot commercials featuring "Mister Magoo" were made and approximately four hundred sixty-five (465) prints of these commercials were broadcast over numerous stations in California dozens of times each day throughout the period of approximately one (1) year [Affidavit of Herbert Klynn, p. 4, par. 8];

that in April of 1956, Frank Delano addressed a confidential memorandum to Philip Liebmann in New York in which he considered the possibilities of ex-

tending the Magoo license for California to the territory of Yuma, Arizona, and of obtaining a license to use the Magoo character to advertise Rheingold beer in New York and in which memorandum he referred to the "California commitment" and the "New York commitment" as a "total commitment" [Deposition of Frank Delano, Ex. 16];

that Philip Liebmann instructed Frank Delano to discuss Petitioner's dispute with Respondents concerning the contracts in issue with Walter Liebmann, who is general counsel for, and an officer and member of the Board of Directors of, Petitioner, but who is not now and never has been either a member of the Board of Directors or an officer of Rheingold [Deposition of Philip Liebmann, pp. 213-215, 229, 230, 243 and 244];

that Petitioner is a well known eastern brewing-distributing company which has used the trade name and registered trademark "Rheingold" for more than sixty (60) years [Deposition of Philip Liebmann, pp. 206, 211, 212];

that in 1954, Petitioner licensed Rheingold (then called "Acme Brewing Co.") to use Petitioner's trademark "Rheingold" in the manfacture and sale by Rheingold of beer in California [Deposition of Philip Liebmann, p. 243; Ex. 30];

that during a period of approximately two (2) years, commencing in 1954, Petitioner loaned key employees and "a great many of its technicians" to Rheingold for the purpose of supervising the manufacture of Rheingold beer by Rheingold at the Rheingold brewery in California in order to assure the continued high quality of such beer, and that all of these

key employees and technicians, with only three (3) exceptions, remained employees of Petitioner during the time they were in California. Only three actually moved to California, the rest maintaining their homes in the New York area. Moreover, all of these key employees and technicians (with the exception of one who severed his relationship with Petitioner and moved to California) returned to the New York plant of Petitioner upon the termination of the activities of Rheingold in California [Deposition of Philip Liebmann, pp. 248, 250, 252-254, 290, 291];

that during a period of approximately six (6) months Petitioner processed yeast compounds in New York and shipped them to Rheingold in California where they were utilized by Rheingold to brew its beer [Deposition of Philip Liebmann, p. 255];

that samples of bottlings of defendant Rheingold's beer were regularly shipped to Petitioner in New York where they were tested and inspected [Deposition of Philip Liebmann, p. 256];

that beer in the process of manufacture was likewise made available to Petitioner by Rheingold for examination and inspection [Deposition of Philip Liebmann, pp. 256-257];

that ingredients used by Rheingold in brewing its beer were sent by Rheingold to Petitioner in New York to be analyzed and tested, particularly whenever a supplier of those ingredients was changed, and Rheingold was supposed to inform Petitioner whenever it did change suppliers [Deposition of Philip Liebmann, pp. 257-259];

that Petitioner continuously sent its representatives into the Rheingold plant in California to make inspections and tests of facilities, equipment, materials and product [Deposition of Philip Liebmann, pp. 260, 261];

that specimens of all labels, bottles, cans and other containers used by defendant Rheingold were continuously submitted to Petitioner for approval throughout the period of the operation of Rheingold in California [Deposition of Philip Liebmann, p. 262];

that all advertising and promotion material to be used by Rheingold in connection with the sale and advertising of its beer in California was submitted to Petitioner for its approval [Deposition of Philip Liebmann, pp. 262, 263];

that the license agreement between Petitioner and Rheingold provided that Petitioner would own all advertising and promotional ideas developed by Rheingold and that all advertising material would be copyrighted in the name of Petitioner [Deposition of Philip Liebmann, pp. 262, 263; Ex. 30, p. 7, par. 8; Ex. 31, p. 7, par. 8 to Deposition of Philip Liebmann].

Although the foregoing facts were before the Superior Court, Petitioner did not include them in the record which it submitted to the District Court of Appeal. Nevertheless, the entire record of proceedings before Respondent Superior Court was available to the District Court of Appeal for its consideration in ruling upon Petitioner's application for an alternative writ of mandate. (California Rules on Appeal, Rule 12(a).)

This Court, likewise, has the inherent power to penetrate the judgment of an appellate court which it is requested to review and to study the record of the trial court for the purpose of ascertaining the facts upon which to predicate a ruling. (*Stein v. New York* (1953), 346 U. S. 156, rehear. den. 346 U. S. 842.) Respondents have, accordingly, augmented the record herein to include the foregoing facts. Portions of that record, consisting of the affidavits of Glenn Warner and Herbert Klynn are reproduced in Appendix B, commencing at pages 3 and 10, respectively.

Question Presented.

Whether a state court has jurisdiction over a foreign corporation where (1) the foreign corporation has entered into contracts to be performed in the state and which were performed in the state for more than one year; (2) it has (by various means, including the sending of officers, employees and agents into the state) supervised the performance of such contracts and systematically and continuously supervised and controlled the activities of its subsidiary corporation in the state during the period of performance of said contracts and in connection with the manufacture and sale of beer, the sale of which was promoted by the television spot commercials made and exhibited pursuant to the terms of said contracts; (3) it has enjoyed in the state the fruits of such contracts for a period over a year; and (4) it is being sued in such state court for a breach of such contracts.

Reasons for Denying the Writ.

1. **The Decisions of the California Courts Were Not Based Upon the Fact That Petitioner's Subsidiary Was Doing Business in California as Petitioner Represents. Instead They Are Consistent With the Pertinent Decisions of the United States Supreme Court in Holding That a Foreign Corporation Which Becomes a Party to Contracts to Be Performed in a State and Which Were in Fact Performed in Such State, Which Sends Its Representatives Into Such State to Supervise the Performance of Such Contracts and the Activities of Its Licensed Subsidiary in the Manufacture of the Product for the Advertising of Which Such Contracts Were Entered Into, Which Uses the Fruits of Such Contracts in Such State, and Which Is Being Sued in Such State for Breach of Those Contracts, Is Subject to the Jurisdiction of the Courts of That State.**

Petitioner rests its case upon the dual proposition that a foreign corporation may not be subjected to the jurisdiction of the forum state merely because a subsidiary of that corporation did business within the state and that "the foreign corporation must be carrying on the jurisdictional activities in the forum at the time of the purported service of Summons." The first proposition simply ignores the facts. The second is not an accurate statement of law. Considering Petitioner's contentions in order:

(a) *Although the Decisions of All Three California Courts Were Rendered Without Opinion, It Would Appear That the Fact of Parent-Subsidiary Relationship Between Petitioner and Rheingold, Alone, Had Little, if Anything, to Do With Their Determinations.*

If Petitioner had not been a parent of Rheingold, the decision of the lower courts would have been precisely the

same. The controlling evidentiary facts are that Petitioner was present in California when through its key employees and technicians (physically present in California) it exercised supervisory controls over the manufacture of beer in California by Rheingold, when it licensed Rheingold to manufacture beer in California, and when it negotiated, became a party to and supervised the performance in California of the contracts with Respondents upon which this litigation is based. Certainly a decision based upon those factors would not be in conflict with previous decisions of this Court nor would it present an important question of constitutional law to merit a hearing by this Court. In *Perkins v. Benguet Consolidated Mining Co.* (1952), 342 U. S. 437, this Court held that a foreign corporation was doing business in the state of the forum because of the continuous and systematic supervisory activities of the affairs of that corporation by its president who resided in the forum state. Petitioner engaged in similar supervisory activities in California through the agency of its officers, key employees and technicians. A foreign corporation has been held by this Court to be doing business in the state of the forum when, as here, "it had exercised the privilege of conducting activities within the state and enjoyed the benefits and protections of the laws of that state" (*International Shoe Co. v. Washington* (1945), 326 U. S. 310); and when, as here, it entered into a contract with the plaintiff to be performed in that state, and the litigation arose out of that contract (*McGee v. International Life Ins. Co.* (1957), 355 U. S. 220).

(b) *The "Contacts" Between a Foreign Corporation and the State of the Forum Need Not Continue Up to the Time When the Forum Asserts Jurisdiction Over That Corporation.*

The cases cited by Petitioner at page 14 of its brief for the proposition that the jurisdictional activities of a foreign corporation must be carried on at the time of the purported service of summons upon it if the forum is to assert jurisdiction over it are not authority for that proposition, and were not decided upon facts which are even remotely related to the proposition for which they are cited. Thus, in *Consolidated Textile Corp. v. Gregory* (1933), 289 U. S. 85, this Court found that the foreign corporation had engaged in no business activities whatever within the state of the forum and that its only contact with such state consisted of the presence there of its president for the purpose of discussing the settlement of a law suit which was then pending against the corporation outside the state. In *Perkins v. Benguet Consolidated Mining Co.* (1952), 342 U. S. 437, and in *International Shoe Co. v. Washington* (1945), 326 U. S. 310, although the jurisdictional activity was continuing at the time of service of process upon the foreign corporation, there is no indication whatever in either decision that jurisdiction would not attach, absent that factor. Finally, in *Chipman, Ltd. v. Jeffery Co.* (1920), 251 U. S. 373, this Court expressly noted that the contracts upon which plaintiff sued were executed outside the state of the forum, were to be performed outside the state, and that there was no allegation that the causes of action arose out of acts or

transactions which occurred within the state. This Court then disposed of the case by reference to the law and decisions of the courts of New York and did not purport to hold that jurisdiction over Petitioner was dependent upon its doing business in the state of the forum at the time process was served upon it.

We shall not belabor this point. In *McGee v. International Life Ins. Co.* (1957), 355 U. S. 220, this Court held that a foreign corporation whose only act in the forum state had been the assumption of the obligations of a contract of life insurance to be performed in the forum state was properly subject to the jurisdiction of the courts of that state in a subsequent action based upon breach of that contract. It is of at least passing interest that this decision is ignored by Petitioner in its brief. Not only is this decision a conclusive answer to the assertion that a foreign corporation's jurisdictional activities must continue up to and including the date of the service of summons, but also it affords more than ample basis for a finding that the contracts between Petitioner and Respondents subjected Petitioner to the jurisdiction of the California courts in this action for the breach of those contracts. (See also, *Young v. Masci* (1933), 289 U. S. 253; *Hess v. Pawloski* (1927), 274 U. S. 352.)

2. By Moving to Strike Certain Answers From the Depositions and Certain Portions of Affidavits Which Were Offered in Evidence, by Filing Its Motion Objecting to Certain Questions in Depositions, and by Moving to Withdraw Those Motions, Petitioner Made a General Appearance Before the Respondent Superior Court, Thereby Subjecting Itself to the Jurisdiction of That Court.

Under California rules of pleading and practice a litigant who enters a special appearance to challenge the jurisdiction of the court will be held to have made a general appearance if he raises any question beyond that of jurisdiction or asks for relief which could be granted only upon the hypothesis that the court had jurisdiction over his person. (*Lincoln v. Superior Court* (1943), 22 Cal. 2d 304, 311-312, 139 P. 2d 13; *MacPherson v. Superior Court* (1937), 22 Cal. App. 2d 425, 430-431, 71 P. 2d 91, Pet. rehear. den., Pet. hear. den.; *Miller v. Miller*, (1943), 57 Cal. App. 2d 354, 359-360, 134 P. 2d 292.)

Respondents have, as heretofore noted, caused additional certified portions of the record before Respondent Superior Court to be transmitted to this Court. Included in that record is the "Motion of Liebmann Breweries, Inc. Appearing Specially Only on the Motion to Quash Service of Summons to: (1) Object to questions in depositions offered in evidence by plaintiffs; (2) Move to strike answers in depositions offered by plaintiffs; and (3) Move to strike portions of affidavits offered in evidence by plaintiffs," dated April 2, 1959, which was filed by Petitioner. At the hearing before Respondent Superior Court the Respondents asserted that in making those motions Petitioner had submitted itself to the jurisdiction of the court because it had requested affirmative relief which could properly be given only to a party to the proceedings.

During the course of that hearing Petitioner moved Respondent Superior Court for permission to withdraw said motions and that permission was granted (Minute Order of Respondent Superior Court, Appendix B, p. 15). Respondents contended at that time and still contend that in making a motion to withdraw such motions Petitioner was requesting still further affirmative relief from Respondent Superior Court and thus again submitting itself to the general jurisdiction of that court.

This Court will give effect to local rules of practice and procedure. (*John v. Paullin* (1913), 231 U. S. 583; *Newman v. Gates* (1907), 204 U. S. 89.)

Inasmuch as the California courts could have found that Petitioner had made a general appearance and had thus submitted itself to the jurisdiction of Respondent Superior Court under the California rules of practice and procedure, and inasmuch as the decisions of the California courts were rendered without opinion, this Court should not accept certiorari. (*Hedgebeth v. North Carolina* (1948), 334 U. S. 806; *Woods v. Nierstheimer* (1946), 328 U. S. 211; *White v. Ragen* (1945), 324 U. S. 760.)

3. This Court Should Not Grant Petitioner's Request for a Hearing Because of the Necessarily Interlocutory Character of the Judgment of the California District Court of Appeal.

If Petitioner were correct and if the California District Court of Appeal incorrectly refused its petition for an alternative writ of mandate so that a decision favorable to Petitioner should be entered in this Court after granting certiorari, the only effect of that decision would be to compel the District Court of Appeal in California to issue an alternative writ of mandate whereupon it would recon-

sider the issues presented here upon the entire record before the Superior Court as though upon a hearing for an order to show cause. (Cal. Code Civ. Proc., Sec. 1087; Rule 56(c), Calif. Rules on Appeal; *Dare v. Bd. of Medical Examiners* (1943), 21 Cal. 2d 790, 797, 136 P. 2d 304.)

Under circumstances strikingly similar to those here presented this Court held that the interlocutory character of the judgment before it justified its refusal to accept certiorari. (*Hammerstein v. Superior Court of California* (1951), 341 U. S. 491.)

Conclusion.

To summarize Respondents' position:

Following the refusal of the California Superior Court to grant Petitioner's motion to quash service of summons upon it, during the course of which Respondents believe Petitioner made a general appearance, Petitioner has succeeded in avoiding the necessity of answering the complaint of Respondents herein for approximately eight months. During the interim, in each instance when Petitioner sought relief from an appellate court, it withheld that part of the record below which supported the decision of the Superior Court. In each instance it boldly took the position that the court below based its decision solely upon the fact that Rheingold, which was doing business in California, was a subsidiary of Petitioner.

Respondents respectfully urge that an examination of the record before the California Superior Court will compel the conclusion that the California courts arrived at their respective decisions because the record before the Superior Court showed that Petitioner is being charged as a party for breach of contracts which were to be performed in

California, which were in fact performed in California under the supervision of representatives of Petitioner, under which Petitioner enjoyed benefits in California for a period of over a year, and which were designed to advertise and promote the brewing and sale of beer in California by Petitioner's licensed subsidiary, the activities of which Petitioner closely, continuously and systematically supervised by means of numerous representatives of Petitioner physically in California.

Therefore, Respondents respectfully urge that Petitioner's petition be denied.

GORDON E. YOUNGMAN of
YOUNGMAN, HUNGATE & LEOPOLD,
RICHARD HUNGATE,
GLENN WARNER,
Attorneys for Respondents.

APPENDIX A.

Pertinent Statutes Involved.

"*Contents; alternative writ; peremptory writ*

"The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return day inserted."

California Code of Civil Procedure, Section 1087.

"6. Any respondent, including a cross-petitioner, may, within the time allowed for filing his brief in opposition or his cross-petition, file duly certified portions of the record additional to those filed by the petitioner."

Revised Rules of the Supreme Court of the United States, Rule 21, subsection 6.

"(a) Augmentation. On suggestion of any party or on its own motion, the reviewing court, on such terms as it deems proper, may order that the original or a copy of a paper, record or exhibit offered at or used on the trial or hearing below and on file in or lodged with the superior court be transmitted to it, or that portion of the oral proceedings be transcribed, certified and transmitted to it, or that an agreed or settled statement of portions of the oral proceedings be prepared and transmitted to it; and when so transmitted they shall be deemed a part of the record on appeal.

California Rules on Appeal, Rule 12(a).

"(c) Return. If the petition is granted, with or without prior service or opposition, and a writ or order to show cause issues, the respondent or real party in interest, or both, separately or jointly, may make a return, by demurrer, verified answer or both. Unless a different return date is specified by the court, the return shall be made at least 5 days before the date set for hearing. If the return is by demurrer alone, and the demurrer is not sustained, the peremptory writ may issue without leave to answer."

California Rules of Appeal, Rule 56(c).

APPENDIX B.

Affidavit of Glenn Warner.

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc. and Rheingold Brewing Company, Defendants. No. 698,923.

State of California, County of Los Angeles—ss:

GLENN WARNER, being first duly sworn, deposes and says:

1. He is an attorney at law duly licensed to practice law in the State of California and a partner in the firm of Youngman, Hungate & Leopold, who are counsel for plaintiffs in the above matter.

2. He makes this affidavit in opposition to the motion of defendant Liebmann Breweries, Inc. (hereinafter called "Liebmann") to quash service of summons heretofore made upon it.

3. Defendant Liebmann is a New York corporation which has manufactured and distributed beer on the eastern seaboard of the United States under the trade name and registered trade mark "Rheingold" for more than 60 years. Defendant Rheingold Brewing Company (hereinafter called "Rheingold"), on the other hand, limited its activities in the brewing and distribution of beer to California and some marginal areas.

4. Defendant Liebmann owns 5/6ths of the capital stock of Continental Holding Corporation, which, in turn, owns all of the stock of defendant Rheingold. Philip Liebmann is the President of defendant Liebmann and

likewise is the President of defendant Rheingold. The members of the Board of Directors of defendant Rheingold are likewise members of the Board of Directors of defendant Liebmann.

5. On February 8, 1954, defendant Liebmann licensed Acme Brewing Company to use Leibmann's registered trade mark "Rheingold" in connection with the manufacture and distribution of beer in California. Thereafter, and until sometime during the spring of 1957, beer was manufactured and distributed in California under the trade mark "Rheingold" by Acme Brewing Company or its successor corporation, defendant Rheingold.

6. On or about November 30, 1955, defendant Foote, Cone & Belding, Inc. executed a contract with plaintiffs UPA Enterprises, Inc. and Columbia Pictures Corporation "on behalf of our client Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called 'client') and likewise entered into an agreement with plaintiff UPA Pictures 'on behalf of our client Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called "Client").'"

7. The two agreements pursuant to which defendant Liebmann granted to defendant Rheingold and its predecessor corporation, Acme Brewing Company, a license to manufacture and distribute Rheingold Beer in California are attached to the Liebmann deposition on file herein and are identified as Exhibits 30 and 31.

8. Defendant Liebmann received no consideration for the license other than the nominal $1.00 payment which is recited in the agreements.

9. During a period of approximately two years, Liebmann loaned key employees to Rheingold and, as Philip

Liebmann testified, ". . . Over a long period of time a great many technicians were lent to the company." All of these technicians with only three exceptions remained employees of Liebmann throughout the time that they were made available to Rheingold in California. Only three actually moved to California, the rest maintaining their homes in the New York area. Moreover, all of those technicians (with the exception of one who severed his relationship with Liebmann and moved to California) returned to the New York plant of defendant Liebmann upon the termination of the activities of defendant Rheingold in California.

10. During a period of approximately six months Liebmann processed yeast compounds in New York and shipped them to Rheingold in California where they were utilized by Rheingold to brew its beer.

11. Samples of bottlings of defendant Rheingold's beer were regularly shipped to Liebmann in New York where they were tested and inspected.

12. Beer in the process of manufacture was likewise made available to Liebmann by Rheingold for examination and inspection.

13. Ingredients used by defendant Rheingold in brewing its beer were sent by Rheingold to Liebmann in New York to be analyzed and tested, particularly whenever a supplier of those ingredients was changed, and Rheingold was supposed to inform Liebmann whenever it did change suppliers.

14. The foregoing tests and inspections were performed continuously "as long as the operation continued."

15. Liebmann continuously sent its representatives into the Rheingold plant to make inspections and tests of facilities, equipment, materials and product.

16. Specimens of all labels, bottles, cans and other containers used by defendant Rheingold were continuously submitted to Liebmann for approval throughout the period of the operation of Acme Brewing Company and Rheingold in California.

17. All advertising and promotion material to be used by Rheingold in connection with the sale and advertising of its beer in California was submitted to Liebmann for its approval.

18. The license agreements provided that Liebmann would own all advertising and promotional ideas developed by Rheingold and that all advertising material would be copyrighted in the name of Liebmann.

19. The first presentation by Foote, Cone & Belding, Inc. of ideas for the Magoo commercials was made in New York and not in California.

20. Philip Liebmann came to California and participated in several meetings with representatives of plaintiffs looking to the formation of the contracts.

21. Philip Liebmann used the letterhead of Liebmann in addressing communications to plaintiffs and to defendant Foote, Cone & Belding, Inc. relating to the contracts.

22. Throughout the period of negotiations relating to the contracts and during the period of time those contracts were being performed, Philip Liebmann met with representatives of plaintiffs on several occasions in California but never at the offices of Rheingold.

23. During the period from September, 1955, until May, 1956, Byron Mayo of Foote, Cone & Belding, Inc. met in California with Philip Liebmann on at least sixty different occasions.

24. Philip Liebmann could not recall either the telephone number or street address of Rheingold when his deposition was taken although he did know both the telephone number and street address of Liebmann.

25. Philip Liebmann told representatives of plaintiffs that it was necessary for him to present the idea of using the Magoo character to advertise Rheingold beer to stock holders and members of the Board of Directors of Liebmann who lived in Europe.

26. During the course of negotiations, Philip Liebmann detailed Liebmann's history and background to Herbert D. Klynn, a representative of plaintiffs.

27. Before the license agreement was executed and during the period of performance thereunder, defendant Foote, Cone & Belding, Inc. was instructed by Philip Liebmann to attempt to obtain a license to use the character, Mr. Magoo, to advertise Rheingold beer in the New York area.

28. Frank Delano, the senior Vice-President of defendant Foote, Cone & Belding, Inc., who executed the contracts with plaintiffs is the management representative of that company for Liebmann and is directly responsible for the supervision of all Liebmann advertising.

29. William Mathews, an employee of Foote, Cone & Belding, Inc. and the senior account executive assigned by it to the Liebmann advertising account, received copies of correspondence relating to the Magoo commercials.

30. Byron Mayo met with William Mathews in California on several occasions during the period from September, 1955, until May, 1956. He never met with Mr. Mathews at the Los Angeles plant of defendant Rheingold.

31. Dr. Hermann Schuelein, the Chairman of the Board and chief executive officer of Liebmann in 1955 conferred with plaintiffs in California relating to the execution of the contracts in issue and approved newspaper advertising for Rheingold beer in California and New York.

32. It was the practice at Foote, Cone & Belding, Inc. to keep Philip Liebmann informed of all developments in connection with advertising Rheingold beer through the use of the Magoo character, all approvals relating to that advertising were obtained by Mr. Delano from Philip Liebmann and whenever it wanted critical judgment in connection with such advertising Foote, Cone & Belding, Inc. consulted Philip Liebmann.

33. In April of 1956, Frank Delano addressed a confidential memorandum to Philip Liebmann in which he considered the possibilities of extending the Magoo license for California to the territory of Yuma, Arizona, obtaining a license to use the Magoo character to advertise Rheingold beer in New York and referred to the "California commitment" and the "New York commitment" as a "total commitment."

34. Philip Liebmann never told anyone representing the plaintiffs nor authorized anyone to tell them that Liebmann was not a party to the contracts in issue.

35. When a dispute developed between plaintiffs and defendants with respect to defendants' responsibilities under the contracts, Frank Delano addressed letters to plaintiffs in which he referred to his "clients" in the plural.

36. Philip Liebmann instructed Frank Delano to discuss the dispute with plaintiffs concerning the contracts in issue with Walter Liebmann who is general counsel

for, and an officer and member of the Board of Directors of, defendant Liebmann. Mr. Walter Liebmann is not now and never has been either a member of the Board of Directors or an officer of Rheingold Brewing Company.

GLENN WARNER
GLENN WARNER

Subscribed and sworn to before me this 27th day of March, 1959.

GRACE M. SAKAGUCHI
Notary Public in and for said County and State.
My Comm. Expires Oct. 7, 1961

Affidavit of Herbert D. Klynn.

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc. and Rheingold Brewing Company, Defendants.. No. 698,923.

State of California, County of Los Angeles—ss.

HERBERT D. KLYNN, being first duly sworn, deposes and says:

1. I am a Vice President of UPA Pictures, Inc. During the month of September, 1955, Gene Fox of the Hollywood office of Foote, Cone & Belding, Inc. telephoned me and asked if UPA Pictures, Inc. would be interested in licensing its character, Mr. Magoo, for use in advertising Rheingold beer for Liebmann Breweries, Inc. I agreed to cause UPA Pictures, Inc. to prepare a 20 second and 60 second rough story board for presentation to Mr. Philip Liebmann in New York City. I had planned a business trip to New York City and Byron Mayo, of Foote, Cone & Belding, Inc. asked me to meet in New York with representatives of Foote, Cone & Belding, Inc. for the purpose of working out a proposed program.

2. I arrived in New York City during the week of September 15, 1955, where I conferred with Roger Pryor and Byron Mayo of Foote, Cone & Belding, Inc. at the offices of Foote, Cone & Belding, Inc. and discussed the possible terms for the use of the character, Mr. Magoo, in advertising Rheingold beer. Byron Mayo and Roger Pryor told me at that meeting that the two story boards which had been prepared by UPA Pictures, Inc. were to

be presented to Philip Liebmann of Liebmann Breweries, Inc. in New York and that they expected to be able to give us an immediate answer as to whether or not Philip Liebmann wished to use the character, Mr. Magoo, to advertise Rheingold beer.

3. I had only this one meeting with representatives of Foote, Cone & Belding, Inc. in New York City but just before I returned to California I talked with Byron Mayo on the telephone and inquired about the status of the presentation to Philip Liebmann. Byron Mayo told me that the presentation had not yet been made but agreed to advise me on the coast of Mr. Liebmann's reaction to it.

4. I returned to California on September 26, 1955, and within a day or two after that Byron Mayo telephoned me and said that the presentation of the Magoo idea to Philip Liebmann had been highly successful and that Philip Liebmann was coming to California to discuss with me the licensing of the character, Mr. Magoo, for use in advertising Rheingold beer. During the week of September 26, 1955, I met with Philip Liebmann, Byron Mayo and other persons whom I cannot recall at the Beverly Hills Hotel for the purpose of further discussing this arrangement. At that time, Philip Liebmann told me that he was very serious about the use of Mr. Magoo to advertise Rheingold beer and that he was going to Europe to present that plan to European members of the Board of Directors of his company. He requested a verbal option for the use of the character, Mr. Magoo, until October 25, 1955, to which I agreed. Thereafter, I received a letter from Mr. Philip Liebmann on the letterhead of Liebmann Breweries, Inc. dated October 12, 1955, which is attached to the Delano deposition herein as Exhibit 33 in which he acknowledged that meeting.

5. During the latter part of October, 1955, Philip Liebmann came to Los Angeles from New York to resume our discussions and I met with Mr. Liebmann and Mr. Mayo on at least two occasions at the Beverly Hills Hotel and once at the offices of UPA Pictures, Inc. During these meetings Mr. Liebmann explained the background and history of Liebmann Breweries, Inc. and explained his understanding of the way to apply the character, Mr. Magoo, to the advertising of Rheingold beer. Dr. Hermann Schuelein, who was introduced to me as the Chairman of the Board and Chief Brewmaster of Liebmann Breweries, Inc. attended the meeting at the offices of UPA Pictures, Inc. and I also met Frank Delano at that meeting for the first time. I distinctly recall that during one of the meetings at the Beverly Hills Hotel Philip Liebmann talked on the long distance telephone to someone in Europe. That telephone conversation did not relate to any of the UPA matters but it did involve something regarding Liebmann Breweries, Inc. Mr. Liebmann became so excited as a result of that telephone call that he took off his shoe, pounded on the bed and adjourned the meeting. It was my understanding throughout the period of these negotiations that Philip Liebmann and Foote, Cone & Belding, Inc. were representing Liebmann Breweries, Inc. and I was never informed by anyone that they were representing anyone other than Liebmann Breweries, Inc. in connection with the proposed commercial use of the character, Mr. Magoo. I recall the word "Rheingold" being used but it was always my understanding that that word referred to the product to be exploited and not to Rheingold Brewing Company.

6. Throughout the months of September, October and November, 1955, I met with Philip Liebmann on several

occasions and also with Frank Delano of Foote, Cone & Belding, Inc. for the purpose of negotiating the terms of the contracts which were ultimately executed on November 30, 1955. All of those meetings were held either at the Beverly Hills Hotel or at the offices of UPA Pictures, Inc. and I understand that Mr. Ernest Scanlon, the Executive Vice President of UPA Pictures, Inc. conferred with Philip Liebmann and certain representatives of Foote, Cone & Belding, Inc. at the office of Hecht and Lancaster in Hollywood, California, during this same period of time. I never met either Philip Liebmann or any other person at the offices of Rheingold Brewing Company for the purpose of negotiating these contracts nor did anyone else representing any of the plaintiffs in this action.

7. An integral part of these discussions involved the possibility of using the character, Mr. Magoo, not only for advertising Rheingold beer in California but also in New York and during the course of these meetings Foote, Cone & Belding, Inc. caused to be prepared and submitted to me a draft of a proposed license agreement for the use of the character, Mr. Magoo, to advertise Rheingold beer which provided for an option to license that character in the New York area. That draft was not acceptable to UPA Pictures, Inc., however, and the final form of the contract did not provide for the use of the character, Mr. Magoo, in the New York area.

8. On or about November 30, 1955, the contracts which are attached to the Amended Complaint on file herein and designated Exhibits "A" and "C" were executed and thereafter plaintiff UPA Pictures, Inc. produced eight 60 second spot commercials and one special commercial using the character, Mr. Magoo, to advertise

Rheingold beer. UPA Pictures, Inc. caused a total of 465 prints of those commercials to be prepared and they were broadcast over numerous stations in California dozens of times each day throughout the period of approximately one year.

9. It has always been my understanding that Foote, Cone & Belding, Inc. was acting as an agent for Liebmann Breweries, Inc. when it negotiated and executed the contracts and I have never been informed by any person that this was not the case.

/s/ HERBERT D. KLYNN
HERBERT D. KLYNN

Subscribed and sworn to before me this 24 day of March, 1959.

/s/ HELEN H. CLABAUGH
Notary Public in and for said County and State.

(Seal)

Commission Expires 2/4/61

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF LOS ANGELES Dept. 67

Date April 3, 1959 Hon. Evelle J. Younger, Judge J E Rose, Deputy Clerk
Henry Smith, Deputy Sheriff Reporter
7 (Parties and counsel checked if present)

698923	Counsel for Plaintiff:	Youngman, Hungate & Leopold; Richard Hungate and Glenn Warner ✓
UPA Pictures, etc., et al vs Foote, Cone & Belding, Inc., et al	Counsel for Defendant	L. M. Coyle & Cooper ✓ for Liebmann Breweries

NATURE OF PROCEEDINGS

1	2	3	4	5	6
2	2	2	C	2	C

STATISTICAL CODE AO-BT

Motion of defendant Liebmann Breweries, Inc, appearing specially for the purpose of this motion only,
(1) to vacate and set aside order for service of process on defendant Liebmann Breweries,
(2) to quash, annul and set aside service of summons on said defendant
(fourth call)

SUBMITTED LATER:

MOTION DENIED

COUNSEL NOTIFIED BY CARD

Motion of defendant Liebmann Breweries, Inc, appearing specially,
(1) to object to questions in depositions offered in evidence by plaintiffs,
(2) to strike answers in depositions offered by plaintiffs,
(3) to strike portions of affidavits offered in evidence by plaintiffs

Oral motion of counsel for defendant to withdraw motion is granted.

This civil minute order was duly entered Apr 7—1959

Attest HAROLD J. OSTLY
County Clerk and Clerk of the Superior Court of the State of California in and for the County of Los Angeles
By W. H. Smith, Deputy.
Posted in R/A
by [illegible]

April 3, 1959 (7)

In the District Court of Appeal

SECOND APPELLATE DISTRICT

State of California

LIEBMANN BREWERIES, INC., a Corporation,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

UPA PICTURES, INC., UPA ENTERPRISES and COLUMBIA PICTURES CORPORATION,

Real Parties in Interest.

Respondent's Points and Authorities in Opposition to Alternative Writ of Mandate.

STATEMENT OF THE CASE.

This proceeding seeks to compel respondent Court to vacate and set aside its order for service of process upon the petitioner, a foreign corporation, by serving the Secretary of State, and to quash service of summons.

THE FACTS.

The petitioner, a foreign corporation with offices in the State of New York, is engaged in the business of manufacturing beer and is one of the defendants in the action entitled "UPA PICTURES, INC., *et al.*, v. FOOTE, CONE & BELDING, INC., *et al.*," Superior Court No. 698,-923, pending in respondent Court; that petitioner licensed Rheingold Brewing Company, a California corporation,

to manufacture and sell its beer. The action is for breach of contract between the plaintiffs and the defendants involving the use of certain advertising material. The petitioner, having no office in this state and not having appointed an agent for the service of process, was served by serving the Secretary of State pursuant to an order made therefor by respondent Court on November 28, 1958. Thereafter, petitioner moved said Court to quash said service upon the ground that it does not transact business within the State of California. Said motion was heard upon affidavits on behalf of the petitioner in support thereof and counteraffidavits on behalf of the plaintiffs in opposition thereto. Upon the hearing of said motion it was denied by respondent Court.

Point I.

Petitioner Has Failed to Set Forth Sufficient Facts From Which This Court Can Determine Whether Respondent Court Abused Its Discretion in Denying Said Motion.

The only evidence contained in the petition for writ of mandate on the question of doing business are affidavits submitted on behalf of the petitioner, Exhibits "E," "F" and "G." The petition alleges in paragraph VI thereof, on page 4, that the real parties in interest filed affidavits and offered certain portions of depositions in opposition to petitioner's motion. Therefore, respondent Court had before it conflicting evidence on the question of doing business, and such conflicting evidence should have been presented to this Court in the petition for writ of mandate. In the absence thereof, it must be presumed that there was substantial evidence before respondent Court to support its order denying the motion.

POINT II.

THIS COURT SHOULD DENY THE ALTERNATIVE WRIT WHERE THE PETITION WHOLLY FAILS TO PROVIDE A BASIS UPON WHICH THE LOWER COURT'S ACTION CAN BE EVALUATED.

Favorite v. Superior Court, 52 Cal. App. 316, 318-319;

3 Witkin, "California Procedure" Section 56, p. 2545.

POINT III.

THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT RESPONDENT COURT'S ORDER DENYING THE MOTION TO QUASH.

The affidavit of Glenn Warner, filed in opposition to said motion, contains, among other things, the following statements:

"4. Defendant Liebmann owns 5/6ths of the capital stock of Continental Holding Corporation, which, in turn, owns all of the stock of defendant Rheingold. Philip Liebmann is the President of defendant Liebmann and likewise is the President of defendant Rheingold. The members of the Board of Directors of defendant Rheingold are likewise members of the Board of Directors of defendant Liebmann."

"6. On or about November 30, 1955, defendant Foote, Cone & Belding, Inc. executed a contract with plaintiffs UPA Enterprises, Inc. and Columbia Pictures Corporation 'on behalf of our client Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called "client") and likewise entered into an agreement with plaintiff UPA Pictures "on behalf

of our client Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called 'Client').'"

"9. During a period of approximately two years, Liebmann loaned key employees to Rheingold and, as Philip Liebmann testified, '. . . Over a long period of time a great many technicians were lent to the company.'. All of these technicians with only three exceptions remained employees of Liebmann throughout the time that they were made available to Rheingold in California. Only three actually moved to California, the rest maintaining their homes in the New York area. Moreover, all of those technicians (with the exception of one who severed his relationship with Liebmann and moved to California) returned to the New York plant of defendant Liebmann upon the termination of the activities of defendant Rheingold in California."

"10. During a period of approximately six months Liebmann processed yeast compounds in New York and shipped them to Rheingold in California where they were utilized by Rheingold to brew its beer."

"15. Liebmann continuously sent its representatives into the Rheingold plant to make inspections and tests of facilities, equipment, materials and product."

"18. The license agreements provided that Liebmann would own all advertising and promotional ideas developed by Rheingold and that all advertising material would be copyrighted in the name of Liebmann."

"22. Throughout the period of negotiations relating to the contracts and during the period of time

those contracts were being performed, Philip Liebmann met with representatives of plaintiffs on several occasions in California but never at the offices of Rheingold."

"23. During the period from September, 1955, until May, 1956, Byron Mayo of Foote, Cone & Belding, Inc. met in California with Philip Liebmann on at least sixty different occasions."

"31. Dr. Hermann Schuelein, the Chairman of the Board and chief executive officer of Liebmann in 1955 conferred with plaintiff in California relating to the execution of the contracts in issue and approved newspaper advertising for Rheingold beer in California and New York."

The affidavit of Herbert D. Klynn substantiates some of these statements and includes additional statements pertinent to the question of doing business.

From these statements not only could respondent Court conclude that petitioner was doing business in the State of California, but also that the defendant Rheingold Brewing Company was the alter ego of Liebmann Breweries. With this evidence before respondent Court it was justified in denying petitioner's motion.

Respectfully submitted,

HAROLD W. KENNEDY,
County Counsel,

WM. E. LAMOREAUX,
Assistant County Counsel,

EDWARD A. NUGENT,
Deputy County Counsel,
By WM. E. LAMOREAUX,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 241

LIEBMANN BREWERIES, INC., a corporation,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES; UPA PICTURES, INC., UPA ENTERPRISES and COLUMBIA PICTURES CORPORATION,

Respondents.

Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

LEON M. COOPER,
WALTER H. LIEBMAN,
By LEON M. COOPER,
742 South Hill Street,
Los Angeles 14, California,
Attorneys for Petitioner,
Liebmann Breweries, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Comes Now the Petitioner, Liebmann Breweries, Inc., replying to the Respondents' Brief in Opposition to the Petition for Writ of Certiorari, and respectfully submits:

Introduction.

The Petition for Certiorari here has been made to review the final decision of the highest state court in which a decision could be had, the District Court of Appeal, Second Appellate District, State of California,

which, in an original proceeding on a Petition for Writ of Mandate, denied the Petition, and certified that it was material to the determination of the case to decide an important federal question presented to it and decided by it. The only facts and documents which may be considered on this Petition are those contained in the record of the District Court of Appeal.

Respondents have utterly ignored this record and have instead, in violation of the Rules of the Supreme Court, discussed at great length in their Brief, proceedings, depositions and affidavits in the Superior Court of the State of California, which were undeniably not considered by the District Court of Appeal, and which undeniably are not, therefore, a part of the record here. In their determined attempt to prevent this Honorable Court from considering the important constitutional question presented by the record in the District Court of Appeal, Respondents have not hesitated to print in their entirety two affidavits and a Superior Court minute order which were never considered by the District Court of Appeal. These improperly-offered documents were appended to Respondents' Brief, which was predicated entirely thereon.

ARGUMENT.

I.

The Honorable Supreme Court Should Consider Only the Complete Record of the District Court of Appeal and Based Thereon Should Grant the Petition for Certiorari Which Seeks Review of the Final Judgment of the Highest State Court, Having Certified That It Was Material to Its Determination to Decide an Important Federal Question Based Only on the Record Before It.

The District Court of Appeal decided the important federal question presented to it on the verified Petition for Writ of Mandate only on the record before it. The records, files, documents and proceedings in the Superior Court were not transmitted to the District Court of Appeal either by Respondents or pursuant to an Order of Court. Thus they did not become a part of the record. (Cal. Rules on Appeal, Rule 12(a).) Respondents did not file an Answer to the verified Petition for Writ of Mandate. (Cal. Code Civ. Proc., Secs. 1089, 1090.) The District Court of Appeal had no way to consider the matters Respondents now raise. (Cal. Code Civ. Proc., Sec. 1094.) Under California Statutes and Rules of Court a Petition for Writ of Mandate must be verified and must be accompanied by Points and Authorities, but it is not accompanied by a complete transcript of the tribunal to which the Mandate is directed. (Cal. Rules on Appeal, Rule 56; Cal. Code Civ. Proc., Sec. 1086.)

If Respondents had felt there was any merit in the additional matters they raise here, they could have chal-

lenged the legal sufficiency of the Petition for Writ of Mandate, or they could have raised questions of fact, either by a Demurrer or an Answer. (*Swars v. Council of the City of Vallejo,* 64 Cal. App. 2d 858, 149 P. 2d 397 (1944).) Since no answer was interposed, the truth of all the facts in the Petition was conceded (*Western States Construction Co. v. Municipal Court of the City and County of San Francisco,* 38 Cal. 2d 146, 238 P. 2d 562 (1952)), and the failure to file a Demurrer waived any defect in the sufficiency of the Petition. (*Goldman v. Superior Court,* 124 Cal. App. 2d 165, 166, 268 P. 2d 134 (1954).) Although the District Court of Appeal could, under its Rules of Court, have requested or considered other matters, it chose not to do so and, therefore, rendered its decision and certified the existence of the federal question only on the record before it. (Cal. Code Civ. Proc., Sec. 1094.)

Any matters not a part of the record considered by the District Court of Appeal should not be considered by the Honorable Supreme Court. (Revised Rules of the Supreme Court of the United States, Rule 21(1).)

The Honorable Supreme Court should strike such documents and proceedings which are not in the record of the District Court of Appeal. (*McClellan v. Carland,* 217 U. S. 268 (1910).) Since Respondents' Brief relates to documents which are not a part of the record from the Court whose decision is sought to be reviewed, the Honorable Supreme Court should, on motion, strike not only such documents, but that portion of the brief relating thereto. (*Lawn v. United States,* 355 U. S. 339 at 354 (1958).) Petitioner has made a Motion to Strike and Expunge the documents and Brief which Respondents improperly seek to present.

II.

The Honorable Supreme Court Should Disregard and Reject Respondents'. Improper Argument That Petitioner Has Made a General Appearance Because This Was Not Raised Before or Considered by the District Court of Appeal and Because Respondents' Argument Is Factually and Legally Erroneous.

The argument that Petitioner has made a general appearance is totally unwarranted. None of the Superior Court procedural matters on the admissibility of evidence were presented to or considered by the District Court of Appeal in deciding the case before it. On the authority cited above, this Honorable Court should disregard Respondents' argument since the District Court of Appeal's decision was not based on that ground, as the Certificate of Existence of Federal Question conclusively proves.

On the facts and law Respondents' argument is wrong. The truth of the matter is that Petitioner responded to the invitation of the Honorable Superior Court in assisting its consideration of the competency and relevancy of the documents submitted to it by Respondents.

As a matter of California law, Petitioner did not make a general appearance. This Petitioner did not intentionally come into the jurisdiction of the Court for the purpose of appealing any ruling or order going to the merits of the case. (*Dickson v. Parker*, 59 Cal. App. 778, 212 Pac. 42 (1922); *Davenport v. Superior Court*, 183 Cal. 506, 191 Pac. 911 (1920); *Powers v. Braly*, 75 Cal. 237, 17 Pac. 187 (1888).) Under California law an appearance is not general where a foreign corporation challenging the jurisdiction of the California Court par-

ticipates in the determination of questions of fact (*Braden Copper Co. v. Industrial Accident Commission,* 147 Cal. App. 2d 205, 209, 305 P. 2d 222 (1956)), or matters of law. (*Armstrong v. Superior Court,* 146 Cal. App. 2d 420, 423, 301 P. 2d 51 (1956).)

Logic and reason support the rule that a defendant challenging the jurisdiction of a court does not submit to jurisdiction when it establishes facts to prove the validity of service of process (*Garvey v. Compania Metalurgica Mexicana,* 222 Fed. 732 (W. D. Tex., 1915); *Abel v. Smith,* 151 Va. 568, 144 S. E. 616 (1928)), or when it applies for relief from improper discovery procedures. (*Bitter v. Gold Creek Mining Co.,* 225 Wis. 55, 273 N. W. 509 (1937).)

III.

The Honorable Supreme Court Should Disregard and Reject Respondents' Improper Argument That Petitioner Carried on Activities in California Sufficient for the California Courts to Assert Jurisdiction Over It Because Respondents' Argument Is Based on Matters Which Were Not Raised Before or Considered by the District Court of Appeal, and Because Respondents' Erroneous Argument Is Not Supported by the Facts or on the Law.

Because the additional matters raised by Respondents do not appear in the record of the District Court of Appeal, Respondents should not base their arguments upon them before the Honorable Supreme Court. For the reasons and on the authorities cited above these documents should not be considered by this Honorable Court.

The bases upon which Respondents made their argument are inaccurately deduced from these documents. A

correct statement of the facts revealed by these additional documents is as follows:

1. Philip Liebmann, who was President of Petitioner and its subsidiary, Rheingold Brewing Co., carried on negotiations with certain Respondents in the State of California for the use by Rheingold only of advertising material in California.

2. During the time Rheingold was actively carrying on business, Petitioner and its subsidiary, Rheingold Brewing Co., had entered into and were acting under and pursuant to written agreements for the licensing of trademarks and beer formulas, which actions ceased prior to the commencement of the Superior Court lawsuit by Respondents.

These facts emphasize that Respondents are relying upon the parent-subsidiary relationship to support the assertion of jurisdiction. But Petitioner kept a separate and distinct relationship between itself and its subsidiary pursuant to the rule of *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U. S. 333 (1925), which has been consistently followed by the Courts to the present time. A departure therefrom in this case below affronts the established rule and the concept of fairness underlying due process of law.

When Philip Liebmann negotiated in California with regard to the advertising of beer for Rheingold Brewing Co. in the State of California, his activities were conspicuously those of the President of Rheingold Brewing Co. only. He could not have been acting for or on behalf of Petitioner. Petitioner had no license to manufacture, sell or advertise the sale of beer in California. (Cal. Bus. and Prof. Code, Secs. 23356, 23357, 23374.) It did not

do so. If it had done so, it would have been guilty of a misdemeanor (Cal. Bus. and Prof. Code, Secs. 23300, 23301) and California statutes specifically provide that a person is presumed to be innocent of any crime. (Cal. Code Civ. Proc., Sec. 1963.1; *Alford v. Bello*, 130 Cal. App. 2d 291, 278 P. 2d 962 (1955).)

The rule of *Cannon v. Cudahy* supports the conclusion that the conduct of Philip Liebmann establishes the existence of a parent-subsidiary relationship, which will not afford a basis for California courts to assert jurisdiction over the Petitioner. The fact that there may have been officers in common or interlocking directors between the parent and its subsidiary does not have the consequence of giving jurisdiction over the parent to the courts of the forum in which the subsidiary does business. (*Selbert v. Lancaster Chocolate & Caramel Co.*, 23 F. 2d 233 (C. C. A. 6, 1928); see, also, *Berkman v. Ann Lewis Shops, Inc.*, 246 F. 2d 44 (C. A. 2, 1957); *Shedd v. Willys Motors Inc.*, 143 Fed. Supp. 391 (S. D. N. Y., 1956).)

The existence of a license agreement between Petitioner and its subsidiary proves that Petitioner did not intend to nor did it establish any contacts with California so as to submit itself to California jurisdiction. Had Petitioner desired to do business and carry on its activities in California, it would have done so. Instead, it chose not to do so, and licensed its trademarks and formula for the use of its subsidiary. It was the subsidiary which carried on the subsidiary's business and activities in California. This does not supply the constitutional contacts necessary to satisfy the due process requirements. (*Bergholt v. Hudson Motor Car Co.*;

124 Fed. Supp. 716 (D. Minn., 1954); *Hudson Minneapolis, Inc. v. Hudson Motor Car Co.*, 124 Fed. Supp. 720 (D. Minn., 1954).)

Petitioner's license agreement was an incident to its ownership of a majority of the stock of a corporation which owned the stock of Rheingold. The control of the subsidiary is not a submission to jurisdiction. (*Harris v. Deere & Co.*, 233 F. 2d 161 (C. A. 4, 1955); *Dam v. General Electric Co.*, 111 Fed. Supp. 342 (D. Wash., 1953); *Gravely Motor Plow & Cultivator Co. v. H. V. Carter Co.*, 193 F. 2d 158 (C. A. 9, 1951).)

Respondents do not contend, nor can they contend, that Petitioner sells any of its products in California or carried on any business activity in the State of California in connection with its business of manufacturing and the sale of beer. It did not even have sporadic activities in California. (*LeVecke v. Griesedieck Western Brewery Co.*, 233 F. 2d 772 (C. A. 9, 1956).)

The activities which Respondents point to are not those of Petitioner but of its subsidiary, Rheingold.

The alleged contracts which are the basis for Respondents' cause of action could not have applied to Petitioner. The license to use Respondent's advertising character in the State of California and the State of Arizona could only apply to Rheingold Brewing Co. It could not apply to Petitioner either by the terms of the contracts or by any fair or just construction thereof. Petitioner did not have the right to, and did not, manufacture, sell or advertise the sale of beer in the State of California. The contracts were and are completely meaningless to Petitioner's business. The drafts of admittedly unexecuted proposals prove that Respondents knew Petitioner did not do busi-

ness in California and that Respondents only contracted with the subsidiary which did business in California. [See Affidavit of Walter H. Liebman, "Ex. F" to the Petition for Writ of Mandate.] Those drafts could not be the basis for asserting jurisdiction over Petitioner.

The jurisdictional problems raised by the Fourteenth Amendment should be resolved by considering the fairness to the parties involved. Here there are no acts by the Petitioner in California to establish that it enjoyed the protection of California law. It did not contract with California residents. It did not deal in Califorina in matters of special regulatory significance to the State of California. As the depositions themselves prove, the witnesses and testimony as respects Petitioner are not in California, but in New York.

The record also discloses that some of the Respondents had offices in New York, so that there would be little burden for them to litigate against Petitioner in that forum, not in California where they never dealt with Petitioner. Because of the patent unfairness to Petitioner, the jurisdictional problem should be resolved in its favor.

McGee v. International Life Insurance Co., 355 U. S. 220 (1957), is distinguishable from the facts here because it involved a special situation concerning California residents where the evidence was found in California, and was based on a special regulatory provision of the California Insurance Code. Under those particular circumstances, due process was satisfied for that situation. The decision of *McGee* has not given unlimited authority to State Courts to assert jurisdiction over foreign corporations. (*Hanson v. Denckla*, 357 U. S. 235 (1958).)

Respondents misconceive the applicability here of *Chipman Ltd. v. Jeffrey Co.*, 251 U. S. 373 (1920), and

Consolidated Textile Corp. v. Gregory, 289 U. S. 85 (1933). Philip Liebmann negotiated for Rheingold the subsidiary and not for the Petitioner unlike the corporate president in *Consolidated* who acted for the foreign parent corporation. Moreover, *Consolidated's* subsidiary had, unlike Petitioner's, sold the parent's products in the forum. But the acts of the subsidiaries are not relevant in determining the question of jurisdiction.

In *Chipman*, the foreign corporation had removed from the forum before the service of Summons. That is the essential time for jurisdictional purposes. There is no basis whatsoever to indicate the Petitioner had any contacts with California at that time.

Petitioner did not engage in economic or any activity in California. But Respondents, by offering improper documents attempt to becloud the issue and confuse the jurisdictional facts. In essence Petitioner's only activity was carrying on a relationship with its subsidiary which historically has not, as a matter of law, supported the assertion of jurisdiction over foreign parent corporations. It would be an unfair and unconstitutional burden upon Petitioner to have to submit to the jurisdiction of California courts in this situation.

The Honorable Supreme Court should grant the Petition for Certiorari to prevent the unconstitutional acts of state courts contrary to the long-accepted understanding and expectancy of the business community.

Conclusion.

The proper record before this Honorable Supreme Court is clear and uncontradicted. It is based upon the record which was actually before the District Court of Appeal and which the District Court of Appeal con-

sidered in denying the Petition and in certifying the existence of a Federal Question. Respondents sought to have the Certificate of the Existence of the Federal Question amended. They obtained an insignificant modification from the District Court of Appeal, which in no way changes the clear determination by that Court of the fact that it decided the original proceedings before it based upon Petitioner's contention of the Federal question posed by Petitioner. Respondents now seek to confuse the issue before this Court by offering additional documents which were not in the record before the District Court of Appeal whose decision is sought to be reviewed by this Court. They improperly suggest that the decision below is not final, knowing full well that their authority is no longer applicable because of the subsequent enactment of California Code of Civil Procedure, Section 416.3. (Cal. Stats. 1955, Chap. 1452, Sec. 3.) An accurate statement of the facts supports Petitioner's argument and Respondents' additional documents have no effect other than to cloud the issue herein. The Honorable Supreme Court now has an opportunity to consider the issues clearly posed by the proper record of the District Court of Appeal before it on a subject of present national importance to the business community and the bar, and should, therefore, grant the Petition for Writ of Certiorari.

Respectfully submitted,

LEON M. COOPER,

WALTER H. LIEBMAN,

By LEON M. COOPER,

Attorneys for Petitioner,
Liebmann Breweries, Inc.